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ABSTRACT

A study on government regulation of religiously affiliated higher education was conducted for the Sloan Commission on Government and Higher Education. The following two questions were addressed: What legal problems arising from governmental regulation have religiously affiliated colleges experienced at least partially because of their religious affiliation? How might the relationship between government and these institutions be ameliorated? Religious preference in employment policies is examined in relation to federal statutory regulation, judicial decisions, and administrative regulations. Religious preference in student admissions policies is considered in relation to Supreme Court dicta and federal tax policy. Judicial decisions regarding government aid for facilities at religiously affiliated institutions and policy recommendations are examined. A legal analysis and policy recommendations are provided concerning the following areas: protection of the civil rights of handicapped persons, special tax problems, special labor law problems, The Fair Housing Act and the segregation of student housing on the basis of sex, sex discrimination in employment practices and in access to federally funded programs, participation of seminaries and seminarians in federal assistance to higher education, constitutional law and the status of religiously affiliated colleges, and state regulation. (SW)

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CHURCH AND CAMPUS:

GOVERNMENT REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION

ED180273

Study for the Sloan Commission on Governmemt
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FOREWORD

In 1977 the University of Notre Dame established the Center for Constitutional Studies at the Notre Dame Law School to engage in scholarly research and analysis concerning legal problems encountered by independent and religiously affiliated institutions of higher education. The authors of this study are the professional staff of the Center. We wish to express our appreciation to the University for its continuing financial support for the work of the Center.

We wish to acknowledge our gratitude to Dr. Carl Kaysen, Vice Chairman and Director of Research and to the Commission staff, notably Edward S. Gruson and Crystal Lloyd, both for the financial support provided by the Commission to undertake this study and for their critical comments on a prior draft of this document.

We wish likewise to acknowledge our thanks to Dr. John D. Phillips, President, National Association of Independent Colleges and Universities, who provided a subsidy to defray the costs of production and mailing to 800 college administrators the survey instrument which formed the basis of our empirical research. Dr. C. Lincoln Johnson, Director of the Social Science Training Laboratory at the University of Notre Dame, helped design this survey instrument. And his staff, notably David Brinkman and Mark Miller, processed the data gleaned from responses to the survey.

Several members of the Center's Advisory Board who are college administrators also assisted by acting as a pilot group who reviewed a prior draft of the survey instrument. We have also profited from the critical review of chapter eight by one of our Board members,

Dallin H. Oaks, President of Brigham Young University.

We wish to acknowledge our gratitude to our colleagues at Notre Dame Law School who responded critically to drafts of portions of this study: to Dean David T. Link who reviewed chapter six, to Professor Bernard Dobranski who reviewed chapter seven, and to Professors Charles E. Rice and Kenneth F. Ripple who reviewed chapter eleven. We are especially grateful to the Rev. Charles M. Whelan, S.J., Professor of Law at Fordham University, for his kindness in reviewing a draft of the entire study. The comments of these scholars invariably helped to improve this document and on occasion to save us from errors. We are grateful for their assistance, but accept full responsibility for whatever defects may remain in this study.

Responsibility for drafting and editing this document was shared by the authors. Philip R. Moots had primary responsibility for preparing the introduction and chapters four and twelve, and Edward McGlynn Gaffney, Jr., had primary responsibility for the remaining chapters. Both authors reviewed one another's drafts and provided critical comments.

The student interns associated with the Center provided valuable research undergirding the legal analysis contained in this study: Sr. Kathleen Moroney, C.S.C., (chapters two and seven), Mr. Raymond Dalton (chapter four), Mr. Robert Carsello (chapter five), Miss Barbara Kramer (chapters six and nine), and Mr. John Selent and Mrs. Ethna Bennert-Cooper (chapter twelve).

Finally, we wish to express special thanks to our Administrative Assistant, Mrs. Rosemary Reiter, who has generously labored long hours, often overtime, to produce the typescript of this study.

She has not only been extremely competent but unfailingly gracious under the pressure of meeting deadlines.

Philip R. Moots, Director
Edward McGlynn Gaffney, Jr.,
Associate Director
Center for Constitutional Studies
Notre Dame Law School
February, 1979

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GOVERNMENT REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION

Study for the Sloan Commission on
Government and Higher Education

Introduction

Religiously affiliated and religiously oriented colleges and universities have played a central role in the history of higher education in this nation and still comprise a significant segment of our independent higher education sector. Some 800 colleges and universities have been identified as religiously oriented or as having affiliation with some religious body.[1]

As a result of the special nature of these institutions, unique problems are presented by certain aspects of government regulation. Fundamental constitutional issues and complex policy questions are posed. This study seeks to analyze the current state of the law with respect to the most prominent of these issues and to suggest policy recommendations to meet the problems encountered.

Any study of colleges and universities in the United States which are related to religious bodies, or which are autonomous but religiously oriented institutions must acknowledge the marvelous variety of the character of these institutions themselves and their relationships to the religious bodies. No single term will suffice to describe adequately all of these institutions, but after some consideration the authors have chosen the term "religiously affiliated" as the single most comprehensive and relatively simple term to denote all of these institutions and their relationships, including those which are religiously oriented but are really related to no

other religious body. Other terms also used frequently in this study and elsewhere to indicate these institutions as a group include "church related" and "related to religious bodies."

There is no need in this paper to attempt another detailed description of the varieties of colleges and universities to which we refer, but it is helpful to mention briefly some of the patterns and characteristics identified elsewhere.

The most comprehensive study to date is that of Manning M. Pattillo, Jr. and Donald M. MacKenzie, Church-Sponsored Higher Education in the United States. That study traces the history and outlines the dimensions of "church-sponsored" higher education in this nation and describes the varieties of relationships with religious bodies.[2]

The most recent general study of which we are aware is that undertaken by the National Council of Churches, Church-Related Higher Education: Perceptions and Perspectives which is to be published this fall.[3]

Pattillo and MacKenzie underline the problems of defining a religiously affiliated institution and select six elements which they suggest be used in analyzing college-church relationships. Those elements are governing board composition, ownership, financial support, acceptance of denominational standards or use of denominational name, educational aims, and selection of faculty and administrative personnel.[4] They emphasize the difficulty of using any one or combination of these elements to predict the precise nature of any single institution, but they propose four major patterns to describe these institutions in some meaningful generalized terms.

The models they describe are 1) "defender of the faith college" with "is explicitly and self conscientiously theistic," 2) the "non-affirming college," which has a mostly formal or structural relationship to the related religious body but gives relatively little formal attention to religion. 3) The "free Christian college" which "stands unapologetically for religion and liberal education," but relies on "example, persuasive presentation of ideas, and a climate of conviction, rather than of conformity, to accomplish its ends," and 4) the "church related university" which very much resembles any independent university but "does consider itself in some sense church related."[5]

The National Council study devotes an early chapter to "myths of church relatedness" in describing the problems of definition and then proposes its own categories complete with charts: 1) the "consonant college" or the "ally" which "while feeling independent in its own operations, is committed to the tradition of its related church and to consistency with that tradition in its own behavior," 2) the "proclaiming college" or the "witness" which "joyously announces its affiliation with its sponsoring denomination at every appropriate occasion" and in its program "practices what it claims in ways which seem approvable to the two worlds in which its exists, education and religion," and 3) the "embodying college," or the "reflection" which "is the Reflection of the church, true in every major respect, sound in faith and observance."[6] That study then goes on to propose "Essentials of Church Relatedness" for both college and church[7] if they are serious about the link.

A further understanding of the nature of religiously affiliated higher education can be gleaned by reviewing other studies cited

in both the Pattillo-MacKenzie and the National Council works which include a surprising number of recent studies by various denominations of the institutions related to them.[8]

As is readily apparent, the categories or labels suggested by these and other studies are of relatively little use to a casual reader. One can easily quarrel with particular characterizations and categories, but some considered attention to this great variety of patterns and relationships is fundamentally important for any serious examination of the problems of government regulation of these institutions. These patterns of diversity suggest very different policy recommendations for what is appropriate government regulation and also produce very different legal consequences under existing law. These variations will be analyzed throughout this study.

Again, in accordance with the stated goals of the Sloan Commission, this study seeks not merely to analyze the issues involved for the benefit of representatives both of religiously affiliated higher education and of government agencies, but to propose solutions for these problems and, where feasible, to suggest specific language for additions or changes in applicable law.

CHAPTER ONE

GENERAL REPORT OF CENTER SURVEY

A. SCOPE OF THE PROJECT

In the summer of 1978 the Sloan Commission for Government and Higher Education engaged the Center for Constitutional Studies to undertake a study of the legal problems unique to religiously affiliated colleges and universities. These problems might be unique in the sense that they arise only because of the religious affiliation of the institution. An example of this sort of question is whether public funding of a church related college is precluded by the First Amendment prohibition of an establishment of religion. Or they might include the application of an otherwise valid statute to a religiously affiliated college in such a way as to abridge the claims of that community to the First Amendment protection of free exercise of religion. An example of this kind of question is whether a religiously affiliated college is protected in resisting an interpretation of the federal regulation defining alcoholism and drug addiction as a handicap for purposes of a civil rights statute to the extent that such an interpretation would undermine the religiously based teaching of the college or its sponsoring religious body concerning the use of alcohol and illicit drugs. Neither of these questions would be relevant for public or independent colleges. Both are supremely important to religiously affiliated institutions of higher education.

As was suggested in the Introduction to this report, there already exist several significant studies of these institutions,

from the report of the Danforth Commission in 1966[1] to a most recent publication undertaken by Merrimon Cuninggim and staff persons of the National Council of Churches.[2] Although some of the earlier studies are now dated, all of these studies include useful information about these institutions, but not generally concerning the topic of this study. Studies undertaken in the 1960's could not, of course, investigate the impact of federal regulation on religiously affiliated higher education, for this impact was not felt in any significant degree until the 1970's.[3] And it would be unfair to demand even of the most recent studies an investigation beyond the scope of their author's inquiry.[4] Hence a new study was necessary to explore two questions previously unexamined by scholarly research: What legal problems arising from governmental regulation have religiously affiliated colleges experienced at least partially because of their religious affiliation? How might the relationship between government and these institutions be ameliorated?

B. METHODOLOGICAL CONSIDERATIONS

Clarification often occurs by contrast. On this theory, we observe here that the method of empirical research used in this study was consciously different from that employed by the research in the study conducted by the staff of the National Council of Churches. That project sought to identify responses to the following questions:

> - What distinctive marks are there, if any, that might pertain to a college that is related to a body of the Christian church? What authentic marks are there that pertain particularly to the religious heritage or present denominational relationship of the institution?

> - What will be lost either to church or to education if a number of the institutions continue as liberal arts colleges (or whatever) but not as church-related institutions, if they no longer evidence with integrity some distinguishing marks of church relationship in their purposes and practices?
> - What alternative styles, models, or options can be envisioned for the future that seem viable and represent integrity and quality with regard to both the educational mission and the purpose of the church?[5]

The method employed was to send investigators to each of 14 participating colleges for two days "to assess the intentionality of each college's relationship to the church and the intentionality of the denomination in relation to the college as perceived by faculty, students, administrators, and in some cases, trustees, alumni and others."[6]

One difficulty with this method of gathering data is that the possibility of skewed responses was increased by the number of investigators.[7] We attempted to avoid this difficulty by designing a single uniform survey instrument which was sent to all persons in the target population.

A second methodological difficulty presented by the Council of Churches study is that it included only 14 institutions out of a total population of approximately 800, with no adequate guarantee of randomness in the selection process.[8] We attempted to avoid this difficulty by sending the survey instrument to all 800 institutions regarded as religiously affiliated by the National Association of Independent Colleges and Universities.

A third difficulty with the Council of Churches study is that it proceeded in circular fashion by assigning generalized conclusions concerning the varieties of church-relatedness to the broad universe of religiously affiliated institutions of higher education

on the basis of a study in which the institutions were consciously selected for inclusion in the sample on the hypothesis that they represented "different points on a spectrum of strong to weak identification with a religious tradition."[9] We have attempted to avoid this difficulty by refusing to rely on a priori categories in our identification of the sample and by eschewing generalizations in this study which are not supported by the data.

C. SURVEY RESULTS

The authors acknowledge at the outset that we are neophytes in the field of empirical investigation. Like any novice, we have made mistakes. For example, in at least two instances we asked for too much information in a single question, with the result that the responses to those questions are extremely difficult to interpret.[10] Other questions were phrased in a misleading or ambiguous fashion. And we undoubtedly deterred some potential respondents from participating in the survey by placing complicated or technical questions too close to the beginning of the survey instrument.

The survey instrument itself was lengthy,[11] and this fact alone may have deterred many busy administrators from placing participation in this study high in priority on a list of many demands for their time. We were aware of the probability that a lengthier survey instrument tends to generate a lower response, but opted for fuller information from a potentially smaller sample. As it was, 220 institutions (27.5%) were represented in our survey. We are confident that if this study is used with careful attention to the characteristics of the respondents, it will contribute statistically valid information about the experience of these institutions with legal difficulties.

Of the 220 colleges and universities responding to our survey, 16 were seminaries or bible colleges engaged principally in the formation of Christian ministers. These institutions were isolated from the rest of the sample, and their responses have been excluded from all the frequencies reported in chapters two through nine. The responses of seminary administrators thought most pertinent to the themes of chapter ten are reported there.

Each of the chapters in the remainder of this study reports data relevant to the theme of the chapter. It suffices to report here only the general characteristics of the sample population.[12]

First, the respondent colleges and universities may be located on a spectrum from very small to large institutions, ranging from 6 to 750 faculty members,[13] from 25 to 25,000 full-time students,[14] and from $160,000 to $110 million in annual educational and general budgets.[15] The bulk of our sample was composed of medium sized institutions. For example, the mean average faculty size was 88.3, the mean average student body was 1579.2, and the mean average annual budget was $6 million.

All but three (1.6%) of the respondents indicated that their institutions are affiliated with a religious body or church.[16] There were 70 Roman Catholic institutions (38.3%) participating in the study, 20 Southern Baptist institutions (10.9%), and 20 United Methodist colleges (10.9%). The remaining 70 institutions (38.3%) were divided among several denominations including the Latter-Day Saints of Jesus Christ (Mormons), the Lutherans, the Presbyterians, the Seventh-Day Adventists, and the Church of God. Although nearly all respondents reported some church affiliation, 20 respondents (10.9%) indicated that they do not maintain records of

the denominational affiliation of their faculty members[17] and 18 respondents (9.8%) indicated that similar information concerning their student body is unavailable.[18]

As was anticipated, these institutions reported a significant increase in the experience of legal difficulty within the last five academic years (1973-1978). In the prior five years (1968-1973) 48 institutions (26.2%) were either named as a defendant in a lawsuit or were involved as a party in a proceeding before a federal or state administrative agency.[19] In the next five years (1973-1978) 44 institutions (24%) reported greater difficulty with legal problems than was experienced in the previous five years.[20]

As was likewise expected, only a handful (2.2%) of the respondents have a full-time General Counsel within the institution to handle their legal problems.[21] In fact, we were mildly surprised to learn that 39.3% of these small to medium sized colleges have even retained on a part-time basis[22] attorneys who spend up to 40% of their time on college business, and an average of about 10% of their time in this work.[23] Ninety-two respondents (50.3%) indicated that the institution has not experienced legal problems sufficiently to warrant hiring or retaining an attorney.[24] Only 6 of the respondents (3.3%) indicated that they had experienced legal problems sufficiently to warrant hiring or retaining an attorney, but lacked the funds to do so.[25]

The data concerning plaintiff and defendant characteristics were bifurcated into two five-year periods, academic years 1968-1973 and academic years 1973-1978. The following table represents plaintiff characteristics during those periods.

TABLE ONE: PLAINTIFF CHARACTERISTICS[26]

	AY 68-73	AY 73-78	% INCREASE
FACULTY MEMBER	19	44	231.5%
NON-FACULTY EMPLOYEE	4	33	825%
LABOR UNION	1	5	500%
STUDENT	11	38	345.5%
STUDENT ORGANIZATION	0	4	-
FEDERAL AGENCY	3	7	233.3%
STATE OR LOCAL AGENCY	2	9	450%

The following table represents defendant characteristics during these periods.

TABLE TWO: DEFENDANT CHARACTERISTICS[27]

	AY 68-73	AY 73-78	% INCREASE
PRESIDENT OR TOP-LEVEL ADMINISTRATOR	11	29	263.6%
TRUSTEE	1	9	900%
FACULTY MEMBER	4	14	350%
STUDENT	2	7	350%
CHURCH OFFICER	0	3	-

Both tables reflect sharp percentage increases in frequency of experience with legal problems, but the frequencies in the final column would be more meaningful if they were broken down into annual increments. Three developments are worth note. First, non-faculty members appear to have become relatively more litigious than faculty members, labor unions and students who sued these institutions in the last five years. Secondly, the startling increase of lawsuits in which a member of the governing board is joined as a defendant suggests that these institutions ought to inform their

trustees about their potential vulnerability to such suits and ought to protect their trustees against such liability by adequate insurance coverage.[28] Thirdly, church officers in the sponsoring religious bodies are now being sued with greater frequency than before.

Very few of the respondent institutions can afford to be indifferent to the jurisdictional predicate underlying such federal regulations as those defining alcoholism and drug addiction as a handicap or barring sex discrimination in federally funded educational programs. The specific issues involved in these regulations are discussed in chapters five and nine of this study. It is enough to note here that nearly all (86.9%) of the nonseminary respondents accept some form of federal institutional assistance,[29] and that all of the nonseminary respondents admit students entitled to receive some federal benefit, whether in the form of a grant or a loan.[30] Indeed, the combined amounts of institutional assistance received by the respondent institutions and of student grants and loans available to students attending them reflected in many instances a very high percent of the annual educational and general budgets of these institutions.

In one instance, Sterling College a small, rural institution in Kansas, which is affiliated with but not supported financially or controlled by the United Presbyterian Church, depends on federal and state programs for 54% of its tuition revenue.[31] Many of the very small colleges like Sterling College are in precarious financial condition.[32] They would, accordingly, have to contemplate closing their doors permanently if they did not come to accord with the

government in a dispute over a regulation regarded by the college as an intrusion into its religious mission.[33] The president of Sterling College reflected this constricting lack of options in the conclusion of his report to the Sloan Commission on the impact of federal programs on his institution:

> Being a college with a strong religious background we struggle with the questions of "how much further can we go?" "Will we be able to garner enough support to go it alone?" "What are we willing to sacrifice to 'go it alone?'" Right now many of the very small colleges are playing both sides of the fence. The federal dollars are appealing and attractive but how much of our soul do we sacrifice as a payoff? The fence sitting is becoming harder and harder. Maybe we have sat too long and now are faced with the decision to succumb to the federal government or die. It is questionable whether we have the freedom any longer of an alternate choice. That is an impact![34]

Finally, it must be noted that although complaint about regulation by the federal government has become a fashionable theme in contemporary American politics,[35] the administrators who responded to this survey did not reflect this theme in mindless fashion. Only 23 of them (12.6%) indicated that federal statutes or administrative regulations had actually interfered with the religious mission of their institutions.[36] And they were careful in identifying and often in commenting on, the specific category of legislation or regulation which, in their judgment, had this effect. The relevant data concerning these discrete categories are reported in the first section of the ensuing chapters.

CHAPTER TWO

RELIGIOUS PREFERENCE IN EMPLOYMENT POLICIES

A. THE DATA

As was suggested above an overwhelming majority of the administrators who responded to the Center survey manifest a strong concern for the religious character or orientation of the institutions in which they serve, however varied the definition of religious orientation or the nature of the relationship between a religious body and those campuses.[1] The authors of the 1966 Danforth study of church-sponsored higher education in the United States, Manning M. Pattillo, Jr. and Donald M. MacKenzie,[2] understood that "[o]ne of the surest means of influencing the religious character of an institution is through the appointment of staff members who share a common faith."[3] Accordingly, one of the criteria used by these authors to identify a university as "church-sponsored" was the consideration of the church membership of faculty and administrative personnel in their selection.[4]

Pattillo and MacKenzie cited several examples, including Principia College in Elsah, Illinois, where "[a]ll faculty and staff members are Christian Scientists,"[5] and Florida Christian College in Temple Terrace, Florida,where the charter provided that "all board and faculty personnel would be active members in good standing of some local Church of Christ."[6] The authors noted that both of these colleges maintained this employment policy even though neither college maintained an organizational connection with a religious body. On the other hand, at Rosary College in River Forest, Illinois, where there is a direct link between the college and a sponsoring

religious body (the Sisters of the Order of Saint Dominic of the Congregation of the Most Holy Rosary), preference was exercised not simply for members of the same church (Roman Catholics), but more particularly for members of the sponsoring religious congregation, who filled 91 of the 125 faculty and administrative posts at the college.[7] Similarly at Bethel College in North Newton, Kansas, 47 of the 52 members of the administrative staff and faculty were Mennonites.[8] In short, Pattillo and MacKenzie found that in 1966, most religiously affiliated colleges exercised religious preference in faculty hiring, irrespective of the polity or structure of the church (congregational, presbyteral or synodal, episcopal or hierarchical) and irrespective of whether the relationship between the church and the college is clear or attenuated.

In general, our study confirms this conclusion as of 1978, but adds some enrichment of the data. Pattillo and MacKenzie inquired whether "a given college prefer[s] to appoint to its staff persons who are members of a particular church?"[9] The Center survey inquired more broadly as to preference based on religious orientation as well as church membership and attempted to focus more narrowly on the sorts of positions in which such preference is exercised as well as on the weight attached to religious orientation or church membership in the process of hiring and tenure decisions.

91.7% of the respondents to the Center survey agreed with the statement: "It is important that religiously affiliated colleges and universities retain the right to exercise religious preference in faculty hiring and promotion, without thereby forfeiting their entitlement to receipt of public benefits."[10] A lower percent (72.6%) expressed agreement with a similar statement concerning

religious preference in non-faculty staff employment.[11] Much sharper disagreement emerged in response to a statement that religiously affiliated colleges ought not to lose entitlement to receipt of public benefits for maintaining a policy of racial or gender-based discrimination in employment practices, "whenever that policy is dictated by the authoritative teaching of the church to which the college is affiliated."[12] Nearly 50% disagreed with this statement, but 40% expressed agreement.[13]

As to the actual practice of the institutions surveyed, 37.8% indicated that their general practice is to exercise religious preference in the decision to hire <u>all</u> applicants for faculty positions.[14] 46.1% indicated that such preference is exercised in decisions concerning the hiring of applicants for <u>some</u> faculty positions, most notably in the departments of theology (41.5%) or religious studies (41.5%)[15] and of philosophy (21.3%).[16] 15.6% indicated that religious preference is never exercised in the hiring of faculty at their institutions. Only 22.7% of those who exercise religious preference in faculty hiring indicated that the religious orientation or church membership of the applicant was decisive by itself in the selection process. The remaining 77.3% indicated that this factor is considered as one factor among many.[17] 106 respondents or 57.9% cited either an official statement of the institution or a personal opinion of the administrator concerning the importance of religious preference in faculty hiring.[18]

Although most institutions surveyed exercise religious preference in faculty hiring, 68.1% do not exercise such preference in making decisions to grant tenure to faculty members.[19] 25.3% indicated that they do exercise religious preference in the tenure decision

with respect to all faculty positions. And the remaining 6.6% exercise such preference in granting tenure in some positions, once again notably in the departments of theology or religious studies (7.7%)[20] and of philosophy (4.9%).[21] 15.4% of those who exercise religious preference in the tenure decision indicated that the religious factor is decisive by itself. 78.8% stated that this factor was one among many, and 5.8% indicated that the religious factor was not very important.[22] Thirty-three (18%) of the respondents cited an official policy or their personal opinion in support of the exercise of religious preference in granting tenure to their faculty members.[23]

35.4% of the respondents indicated that religious preference is exercised in the hiring of all administrators,[24] and 52.2% indicated that such preference is exercised in filling some administrative positions, notably the offices of president (46.4%),[25] vice-president (13.1%),[26] and dean (18.6%).[27] 29.7% of those who exercise religious preference in the selection of their administrators indicated that the religious factor is decisive by itself, while the remaining 70.3% stated that it is one factor among many.[28] 105 (57.4%) of the respondents indicated a reason for the exercise of religious preference in the choice of administrators.[29]

Although the vast majority (83.9%) of the institutions surveyed exercise religious preference in the selection of some or all of their faculty, 70.9% stated that they do not exercise such preference in filling non-faculty staff positions.[30] Of those who exercise religious preference in this category, very few (3.3%) indicated that the religious orientation or church membership of a prospective staff employee is decisive by itself; 23% indicated that the

religious factor is one among many; and 3.8% stated that this factor is not very important.[31] 25 respondents (13.7%) indicated a reason in support of religious preference in the selection of non-faculty staff.

Finally, 32.2% of the respondents indicated that contracts of employment at their institutions contain a provision that the employee will uphold the beliefs of the institution or of its sponsoring religious body.[32] This kind of provision appears in the contracts of staff personnel at 11.5% of the respondent institutions,[33] in the contracts of faculty members at 27.9% of the institutions,[34] and in the contracts of administrators at 23.5% of the institutions.[35] Only 7 institutions (4.8%) indicated that there was any occasion during the past five academic years to enforce this provision.[36]

B. A RATIONALE FOR RELIGIOUS PREFERENCE IN EMPLOYMENT POLICIES

This study has a two-fold purpose: to foster greater sensitivity among government officials to the unique needs of religious institutions of higher education, and to stimulate among administrators at these institutions greater understanding both of what the law require and of what it does not require. In achieving both of these goals, it is important to focus first on the reasons which might be adduced in favor of a narrow exemption of religiously affiliated colleges from the general provisions of federal civil rights legislation governing employment discrimination. It will then be easier to proceed in section C of this chapter to examine the legality of this sort of exemption, and to conclude in section D with policy recommendations to clarify the reach of the law in this area.

In articulating a rationale for treating religious preference in employment practices differently from racial or gender-based discrimination, it is important to stress at the outset the need to be discriminating about discrimination. For the First Amendment protects the free exercise of religious values, while racial discrimination both by the government and in many instances by private parties not only has no support in the text of the Constitution, but is positively interdicted by the commands of the 13th, 14th and 15th Amendments as well as by a series of civil rights statutes enacted by Congress after the Civil War. Neither the text of the Constitution nor judicial construction of the Equal Protection Clause of the Fourteenth Amendment amount to as vigorous a prohibition against gender-based discrimination as that which obtains against racial discrimination, but the proposed 27th Amendment (ERA), several leading Equal Protection cases, and many federal statutes in combination add up to a federal policy disfavoring irrational distinctions based on sex. The insistence on the phrase "religious preference," then is more than a linguistic nicety. It is a necessary mode of indicating the difference between the legitimate exercise of a constitutionally protected right and invidious discrimination on the basis of race and sex.

Constitutional arguments supporting religiously affiliated colleges will be explored more fully in chapter 11 of this study. This section will focus on the reasons supporting religious preference in faculty selection at religiously affiliated colleges as articulated by administrators at those colleges.

The phrase "institutional values" is a convenient shorthand expression employed by these administrators to describe the significance attached to the personal and communal living out of the

religious values, goals, and tenets endorsed by the educational institution or espoused by its sponsoring religious body. Biblical values, for example, and the other religious values or faith commitments associated with Judaism and Christianity have incarnate meaning only when human persons consciously choose to live by those values. As Merrimon Cunninggim stated in his study of church-relatedness in higher education:

> An institution is not really very good at valuing, any more than it is at loving or praying. It takes people to pray, to love and to value.[37]

It is in this sense, then, that in the context of a religiously affiliated college, one may speak of "a value-conscious personnel policy designed to foster the institution's most cherished principles."[38]

As both the Cunninggim study and the Center survey suggest, the specific details and scope of such a policy vary widely among those surveyed. Religious preference need not mean that the institution prefers only members of the religious body or church to which the college is affiliated. It may mean preference for a Methodist at a Lutheran institution, or for a Baptist at a Roman Catholic institution. Or it might mean a minimal requirement that all faculty members acknowledge the legitimacy of the goals of the institution, though an individual faculty member might not, in fact, incorporate those goals into the structure of his/her[39] faith commitments. In short, religious preference has a polyvalent character both among institutions and within the same institution.

The need for some form of religious preference has been voiced by many leaders in higher education. For example, at a recent AAC-sponsored conference in Washington, D.C., the spokesman

for St. Olaf College in Northfield, Minnesota, stressed the importance of the relationship between his college and the American Lutheran Church; and he concluded:

> Most importantly of all, we hire people who are committed to these matters [the religious values identified with Lutheran Christianity]. All the programs and money in the world cannot help us achieve our stated ideals unless most of our faculty and administration embrace them out of conviction. When we hire, we try to hire the most capable chemists, artists or deans we can find; but we hire only those who convince us that they believe in our distinctness as a college of the Church, and who persuade us that they cherish our ideals even if they don't share our religious and ethnic heritage.[40]

Another statement of this theme was made forcefully by the Rev. James T. Burtchaell, C.S.C., who while Provost at the University of Notre Dame,reminded his colleagues at a Mass celebrated at the opening of an academic year:

> At Notre Dame we have no task more important than to recruit and invite into our midst men and women who, beyond their being rigorously given over to the profession of learning, are likewise dedicated to a life of intelligent belief. If we are to be a Christian University, we must have a critical mass of Christian teachers. If Notre Dame is to remain Catholic, the only institutional way for assuring this is to secure a faculty with prominent representation of committed and articulate believers who purposefully seek the comradeship of others to weave their faith into the full fabric of their intellectual life.
>
> And we shall continue to need, as we have been blessed with it in the past, the companionship of believers from other religious traditions who sense and share the peculiar ambitions and hopes of Notre Dame. Indeed, it is of the very character of Notre Dame that teacher-scholars from so many religious traditions, and some who are not believers at all, share a common desire that this school retain its wonderful and special character. By no means need only Catholic or even Christian faculty be invited here. But by no means should anyone be invited here unaware that it is a house dedicated to intelligent belief, or indifferent to this heritage....
>
> The predominating presence of Christian, Catholic scholars among our faculty, then, must be a priority of Notre Dame.[41]

When asked recently how the University of Notre Dame would try to maintain its Catholic identity, the new Provost of that university, Dr. O. Timothy O'Meara, replied:

> In several ways. By assuring that the faculty consists of people of all faiths who live by the spirit of Notre Dame. By assuring that committed Catholics predominate in the community. By promoting faculty members on the basis of their character and contribution to Notre Dame's values, in addition to their teaching and research achievements. By fostering religious life on campus, through campus ministry and in the residence halls. And by continuing to explore moral and spiritual questions.
>
> At some universities, it's considered professionally unacceptable to consider such questions. We think they're important. And we think it's important that this school reflect its Catholic heritage. It's one of our greatest strengths.[42]

As was noted above in Part A of this chapter, several respondents to the Center Survey indicated that they exercise religious preference not only in faculty hiring, but also in promotion and tenure decisions, at least in some departments. One participant in this survey, William Jewell College in Liberty, Missouri, indicated in supporting documents that it utilizes a merit system in granting promotion and tenure. According to this system a professor being evaluated for promotion or tenure must demonstrate that he possesses not only teaching competence, professional education, advisory effectiveness, scholarly achievement and contribution to the college, but also "commitment to the Christian character of William Jewell College" as described in the college's official Statement of Purpose. That statement indicates that the college is committed:

> To be an institution with unquestioned loyalty to the ideals of Christ, which includes a Christian philosophy in teaching and in daily living on the campus. The college aspires to be a community in which the Christian commitment of the members exemplifies the compatibility of sound scholarship and the Christian faith, and demonstrates its worthiness as a way of life. In keeping with this viewpoint the individual is challenged to develop a worthy code of conduct for his life which should inspire him to meaningful involvement with his fellow man.
>
> To cooperate thoroughly with the Missouri Baptist Convention to offer the finest Christian education possible. As a church related institution, William Jewell College, founded in 1849 by the Baptists of Missouri, who have continued to provide financial support, aims to serve the denominations and to emphasize the best in its Baptist heritage. The college helps train leaders both professional and non-professional, for the denomination and seeks new methods of communicating the Christian faith to each generation.[43]

The William Jewell statement highlights both the relational need for religiously affiliated colleges to meet the expectations of the constituency of the sponsoring religious group or denomination and the intrinsic need of measuring up to a self-imposed religious standard. The college strongly asserts a right to exercise religious preference in faculty hiring and promotion both because of its reltionship to the Baptists of Missouri who continue to support the college financially and otherwise, and because of its strong desire "to be an institution with unquestioned loyalty to the ideals of Christ."

The above statements by administrators at Notre Dame and William Jewell are fairly representative of a strong point of view asserted by many of the leaders of religiously affiliated colleges and universities in this country. In short, these educators are insisting that no less than a fundamental religious freedom - the right of religious groups to preserve and to transmit their religious heritage in full integrity - is at stake in their employment practices.

As will be suggested later in this study, this position has legal support in the Free Exercise Clause of the First Amendment.[44] This religious freedom is not the only value protected by the Constitution. Indeed, it is not the only religious freedom protected in American law, for the No-Establishment Clause bespeaks at least a different if not a conflicting religious freedom.[45] Furthermore, Congress in 1964 enacted a civil rights statute which stands as a potent antidote against the resurgence of the stubborn virus of religious bigotry,[46] at least in some employment practices.[47] A close examination of the law is necessary, then, in order to discern clearly the limits to the assertion by church related colleges of a religiously based immunity from the general prohibition against discrimination on the basis of religion. Without such analysis, the religious rights of an employer would seemingly become absolute, while the right of the employees to be free from religious bias would be overlooked.

C. LEGAL ANALYSIS

The purpose of this section of the paper is to explore the statutory exemption and exceptions available to religiously affiliated colleges by virtue of the Civil Rights Act of 1964, the limits impliedly imposed on this broad exemption by the Supreme Court and other federal courts in recent First Amendment cases, the relationship between this blend of legislative grace and judicial restriction to the relevant decisions of the Executive Branch, notably to the Executive Orders governing federal contracting and to the regulations of the Internal Revenue Service interpreting and enforcing federal tax policy.

(1) FEDERAL STATUTORY REGULATION

Legal analysis of governmental regulation of the employment practices of religiously affiliated colleges must begin with Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. Concurrent regulation of these colleges by state civil rights statutes are analyzed in Chapter 12 of this study.

Section 703 (a) of the 1964 Act provides in relevant part that:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's...religion...; or (2) to limit, segregate, or classify his employee or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...religion....[48]

Without any other provision, the Act would have rendered illegal any exercise of religious preference in faculty hiring and promotion. But Congress took into consideration the special employment needs of religiously affiliated colleges. It responded positively in section 703(e)(2), which provides that, notwithstanding any other provision of Title VII,

> it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[49]

Secondly, Congress made available to all employers an exception from the ban on religious discrimination to the extent that the

religion of an individual might be a "bona fide occupational qualification" (BFOQ) for a particular job. Section 703 (e)(1) provides:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[50]

Finally, Congress provided not only a particular exception for church related colleges (703(e)(2)) and a narrow exception for those jobs where religion is a BFOQ (703(e)(1)), but it also provided in Section 702 a broad exemption from all the provisions of Title VII, including racial and gender-based discrimination as well as religious preference:

> This title shall not apply to...a religious corporation, association or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.[51]

This broad exemption applied not simply to church related higher education, but to all religious corporations, associations or societies. It exempted not only religiously affiliated colleges but all educational institutions, not only from the general ban on religiously based job discrimination but from all forms of employment discrimination.

In the eight years following the passage of the 1964 Act, educational institutions taken as a whole made little progress in

opening up employment opportunities for women or for members of minority groups in the academy. Thus Senator Harrison Williams, the floor manager of the Equal Employment Opportunity Act of 1972, could observe:

> The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions.[52]

Accordingly, the broad language of Section 702 was narrowed by the 1972 amendment to read:

> This title shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[53]

It seems clear from the legislative history of the 1972 Act that the principal concern of its authors was with the overbreadth of the 1964 version of the Act. As was mentioned above, the Civil Rights Act of 1964 allowed all colleges, whether religiously affiliated or not, an exemption from the strictures of Title VII on unfair employment practices. From the above statement of Senator Williams, one can infer that the legislative intent in 1972 was not to affect the ability of religiously affiliated colleges to exercise religious preference in faculty hiring, but to eliminate the exemption for educational institutions in the area of race and sex discrimination. Indeed, Senator Williams expressly noted in the Senate debate that there was no change introduced by the 1972 Act in the language of section 703(e)(2), which in his judgment preserved fully whatever rights a church related college might wish to exercise with respect to its employment policy.[54]

The floor debate in the Senate produced one significant change in the bill. Senators Sam Ervin and James Allen challenged Senator Williams' view that these colleges were sufficiently safeguarded by leaving section 703(e)(2) alone. Senators Ervin and Allen pointed out that the bill as reported from the Committee on Labor and Public Welfare would allow religiously affiliated colleges to exercise religious preference in hiring only on a showing that the employment position involved a religious activity of the college.[55] Professors of theology and religious studies would undoubtedly meet this test, as would philosophy professors--at least in a tradition where the relation between faith and reason is relatively harmonious. But on the strength of the Senate version of the bill, a college presumably could not consider the religious affiliations or convictions of a professor of a subject which is not arguably a religious activity. Thus Senator Allen objected:

> under the provisions of the bill, there would be nothing to prevent an atheist from being forced upon a religious school to teach some subject other than theology. A religious school would not like to have an atheist or people of different faith teaching other subjects and confining its right to be selective in the choice of its faculty only to those phases of the work carrying out its religious activities.[56]

To remedy this situation, Senators Ervin and Allen proposed striking the word "religious" from the term "religious activities" used in the exemption of religious educational institutions from the prohibition on sectarian hiring practices.[57] Both authors of the amendment spoke of the detrimental impact of §702 on religiously affiliated colleges without their proposed amendment. In a colorful colloquy the two Senators highlighted their concerns about these colleges:

Mr. ERVIN. We have a college in North Carolina known as Davidson College that is affiliated with the Southern Presbyterian Church. Davidson College is supported by the fees of its students and by the voluntary contributions of people interested in its activities. It is not supported in any respect by the Federal Government. I happen to have had the honor to serve as a member of the board of trustees of that institution for ten years.

This college was founded and is controlled by people who believe in giving a Christian education to the students of the institution - as I recall it had at the time I was a member of the board of trustees, and perhaps still has, a regulation which says that any person who is chosen to be a full professor at the institution shall be a member of an Evangelical Christian Church, does the Senator from Alabama think that there is anything immoral or ought to be anything illegal in people who support a college devoted to giving a Christian education taking steps to assure that the youth who attend it should be instructed on any subject, whether religious or non-religious, by teachers who are members of a Christian church?

Mr. ALLEN. It seems to the junior Senator from Alabama to be a very prudent and logical requirement.

Mr. ERVIN. Mr. President, I ask the Senator from Alabama whether, under the provisions of this bill, it would not be made illegal for a college which seeks to provide a Christian education at the hands of a Christian faculty in all subjects to employ in preference to an atheist, or a Mohammedan, or an agnostic, a professor to teach chemistry or educa-nomics [sic] or sociology who happened to be a member of the Christian church.

Mr. ALLEN. Under this bill, I will say to the distinguished Senator, that would be a discriminatory practice and the college could be hailed before the EEOC and ordered to cease and desist from that practice and if it did not comply with that order, it would be subject to penalty.

Mr. ERVIN. I will aks the Senator if under the provisions of the bill the Commission could not only say "Cease and desist from employing a Christian professor rather than a Mohammedan, agnostic or atheist," but the Commission could go further and say, "You have to appoint this other applicant who is a Mohammedan, agnostic, or atheist, to fill this vacant position to teach chemistry or economics or sociology and in addition you will have to pay his salary, from the time he applied for the post."

Mr. ALLEN. Under the bill, that would be possible; but with our amendment, it would not be allowed.[58]

Senator Ervin rejected Senator Williams' argument regarding the sufficiency of section 703(e)(2) because Ervin felt that the amended Section 702, to the extent that it is inconsistent with

the other provision, would be regarded by the Equal Employment Opportunity Commission and by courts as the later and therefore controlling expression of congressional intent.[59] The Senate adopted the Ervin-Allen amendment without voting on it,[60] and the House accepted it as part of the recommendation of the Joint Conference Report.[61]

In summary, then, in three sections of Title VII Congress has indicated a desire that religiously affiliated colleges retain the ability to exercise religious preference at least in some of their employment practices. But the statutory scheme raises as many questions as it provides solutions. First, the Act does not clarify with precision the kind of employment practices exempted or excepted from other provisions of Title VII. According to section 702, any religious corporation or educational institution is exempt from the other provisions of Title VII, to the extent that the employer may with impunity hire "individuals of a particular religion." Does this mean that under the rubric of preferring members of a sponsoring religious body, a religious corporation is exempt from investigation by the EEOC of an allegation of racial or gender-based discrimination? Secondly, section 703(e)(1) enables all employers, whether secular or religious, to hire an employee on the basis of his religion if that characteristic of the employee is a bona fide occupational qualification. Should this exception be construed broadly or narrowly? Thirdly, section 703(e)(2) allows religiously affiliated colleges the opportunity to hire employees of a particular religion, but only if that college is "owned, supported, controlled or managed by a particular religion" or if its curriculum "is directed toward the propagation

of a particular religion?" What do these terms signify? If a college avails itself of this statutory exception to buttress its employment policy, might it thereby be acknowledging something about its character which would render it ineligible for public assistance?

All three of these questions evade easy resolution. Indeed, the third question indicates something of a dilemma: on the face of it, religiously affiliated colleges are allowed to claim a statutory entitlement to the exercise of their religious views only if they concede that in so doing they may legally be described in language which could render them ineligible for the governmental assistance they need to survive.

Although these questions remain unresolved, either by a close examination of the statute and its legislative history, or by a definitive interpretation of the statute's meaning by the Supreme Court, the analysis of this legislation must take into account the general teaching of the Supreme Court on the Religion Clauses of the First Amendment and the cases in lower federal courts focusing on these provisions of Title VII.

(2) JUDICIAL DECISIONS

As was suggested in the preceding section of this chapter, the legislative history of Title VII, both in the 1964 version and its subsequent amendment in 1972, does not contain even the intimation of an opinion concerning the constitutionality of public assistance to church related colleges. The main thrust of Title VII was to provide effective civil rights legislation, not to decide which kinds of institutions might permissibly receive federal

assistance. Even if the authors of Title VII had considered the church-state question lurking beneath the surface of sections 702(e)(2), they would have done so without the benefit of any of the most relevant decisions of the Supreme Court, which began in 1971, seven years after the enactment of the Civil Rights Act of 1964.

By the same token, although the Court's decisions in Tilton (1971), Hunt (1973) and Roemer (1976) have some relevance to the employment question presented in Title VII, it should be stressed that this trilogy of cases directly concerned the constitutionality of various forms of public funding of church related institutions of higher education. Dicta in these cases, however, are highly instructive for the purpose of analyzing the scope of the 1964 Civil Rights Act, because various members of the Court referred explicitly to the employment policy of the religiously affiliated colleges before them as one of the factors supporting the conclusion that these institutions were not "pervasively sectarian" and thereby ineligible for public assistance.

In Tilton v. Richardson[62] the Court sustained federal grants for the construction of academic facilities at church related colleges against a claim that such grants violated the No-Establishment Clause of the First Amendment. One of the arguments made against the constitutionality of the grants was that the policing of the grants by the federal government to insure that buildings constructed with federal funds were not used for sectarian purposes would engender excessive entanglement of the government with church related institutions. In his plurality opinion Chief Justice Burger rejected this contention on the theory that various

factors typically present in higher education[63] diminished the risk that religion would "seep into the teaching of secular subjects."[64] In support of this conclusion the Chief Justice briefly discussed the issue of faculty hiring at the four colleges in Connecticut under scrutiny: "the faculties...at each [of the colleges] are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were...given faculty appointments. ...Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis."[65]

It would seem from Tilton, then, that the Court was willing to consider the religious composition of the faculty as a factor to be included in adjudicating the constitutionality of public assistance to religiously affiliated colleges. It should be added, though, that Chief Justice Burger evidently did not consider this factor to be critical, for he was willing to sustain the aid without requiring any evidence as to the extent of religious preference in the hiring or promotion process. It was enough, for example, that some "non-Catholics were...given faculty appointments" without any inquiry as to the number of non-Catholic faculty members, whether there was a policy against granting tenure to non-Catholics, or whether religious preference was exercised in all departments of the Catholic colleges.

In Hunt v. McNair,[66] the challenged aid was also for construction of college facilities for secular rather than sectarian use, and the Court sustained a plan to finance the construction by tax-free revenue bonds issued by a public authority of the State of South Carolina. The Court noted in passing that the college involved in the Hunt case was subject to substantial control by the sponsoring Baptist Church.[67] But as in Tilton, in Hunt the

religious preference of faculty presented no serious question for the Court, which disposed of the issue in a single sentence: "What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership...."[68]

In Roemer v. Bd. of Public Works of Maryland[69] the challenged aid consisted of annual noncategorical grants provided by the State of Maryland to private colleges, including religiously affiliated institutions, with a proviso that the funds could not be used by the institutions for sectarian purposes.[70] In Roemer the Court found that four Catholic colleges involved in the litigation were not "so permeated by religion that the secular side [could] not be separated from the sectarian."[71] In his discussion of the factors considered by the Court in reaching this conclusion, Justice Blackmun paid greater attention to religious preference in the employment of college faculty than was paid to it by the majority in Hunt.[72] Early in his opinion he alluded to this issue by way of an implied contrast with the state-supported elementary and secondary teachers in Lemon v. Kurtzman.[73] According to Blackmun, parochial school teachers

> were bound to mix religious teaching with secular ones, not by conscious design, perhaps, but because the mixture was inevitable when teachers (themselves usually Catholics) were "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith."[74]

And later in his opinion, Justice Blackmum summarized the findings of the District Court on this matter:

> The District Court found that, apart from the theology departments, faculty hiring decisions are not made on a religious basis. At two of the colleges, Notre Dame and

> Mount Saint Mary's, no inquiry at all is made into an applicant's religion. Religious preference is to be noted on Loyola's application form, but the purpose is to allow full appreciation of the applicant's background. Loyola also attempts to employ each year two members of a particular religious order which once staffed a college recently merged with Loyola. Budgetary considerations lead the colleges generally to favor members of religious orders, who often receive less than full salary. Still, the District Court found that "academic quality" was the principal hiring criterion, and that any "hiring bias," or "effort by any defendant to stack its faculty with members of a particular religious group," would have been noticed by other faculty members, who had never been heard to complain.[75]

Most recently, in Smith v. Bd. of Governors of the University of North Carolina,[76] the Supreme Court summarily affirmed a District Court ruling that public assistance to students at religiously affiliated colleges did not violate the No-Establishment Clause. Although Smith was decided after Roemer, the District Court seemed to rely less on the language in Hunt and Roemer than on the Tilton standard which allowed a predominance within the faculty of persons adhering to the community or tradition of the sponsoring religious body. The Smith Court chose to ignore both the language in Hunt which admitted of "no religious qualifications" for faculty membership, and the reliance by the Supreme Court in Roemer on the lower court finding that "apart from theology departments, faculty hiring decisions are not made on a religious basis." From the summary affirmance of Smith, it might be inferred that the Justices in the majority in Hunt and Roemer may have been speaking casually in their dicta in those cases concerning faculty hiring. In any event their subsequent affirmance of Smith suggests that, at least in the context of a challenge to tuition assistance on First Amendment grounds, the Justices did not intend as a matter of constitutional law to place religiously affiliated colleges on the horns of a dilemma: either to abandon their right to exercise religious

preference in faculty hiring or to be adjudged to be "pervasively sectarian" and thus ineligible for the governmental assistance they need to survive.

It should be clear from this rapid survey of the higher education trilogy not only that in ruling on the eligibility of a religiously affiliated institution the Court will look to the employment practices of that institution, but also that the statutory language concerning employment practices at religiously affiliated colleges raises serious church-state issues.

Section 703(e)(2) of the 1964 Civil Rights Act appears on the face of it to be a generous recognition by Congress that church related colleges have special needs which must be accommodated if the Free Exercise Clause is to be given meaning.[77] When, however, one rereads the 1964 Act after Tilton, Hunt, and Roemer, the generosity of Congress is by no means overwhelming. To the contrary, should a litigant desire to test the language of section 703(e)(2), it is entirely conceivable that a court would rule the provision inapplicable to many, if not most, religiously affiliated colleges in this country. The Center Survey as well as the National Council of Churches study suggest that a broad variety of relationships now exist between religiously affiliated colleges and their sponsoring or affiliated religious bodies. Perhaps the language of section 703(e)(2) was descriptive of many of the church related colleges in 1964, but it no longer describes accurately many of the colleges which ought to be free to exercise some degree of religious preference in faculty hiring,because that kind of choice is important for many more institutions than those which are "owned, supported, controlled, or managed by a particular religious corporation, association, or society."

The second test found in section 703(e)(2) is similary troublesome. For to gain the exception made available by the statute, a college must concede too much if it wishes to remain eligible for public assistance. By stating that its curriculum "is directed toward the propagation of a particular religion," the college may appear to have acknowledged its "pervasively sectarian character" and thus to have rendered itself ineligible for federal and state subsidies to which they would otherwise be entitled. In short, then, the current language of section 703(e)(2) is too restrictive.

If a case can be made that the language of the statute is too restrictive as to religious employers, a similar argument can be made that the statute is overbroad as to employees who may experience discrimination on the basis of religion. By the terms of the statute, section 702 allows a religious employer to hire individuals of a particular religion to perform work connected with any of the employer's activities, whether related to a religious goal or purpose or not. And section 703(e)(2) similarly allows a religiously affiliated college to hire employees of a particular religion. Only the provision in section 703(e)(1) requires a showing that the religion of the prospective employee is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." In short, only the BFOQ exception requires an employee to demonstrate a connection between the general religious purposes of the employer and a particular job before taking the religious orientation or church membership of a prospective employee into account.

Does the breadth of scope in the section 702 exemption accord with the general teaching of the Supreme Court on the No-Establishment

Clause of the First Amendment? Two federal circuit courts had an opportunity to rule on this question, but declined to do so.

The first appellate court decision, McClure v. Salvation Army,[78] involved a claim based on section 702 of the 1964 Act before it was amended in 1972. Miss McClure, a female minister, was ruled to be an "employee" within the meaning of Title VII for the purpose of complaining that her "employer," the church in which she was ordained, had unlawfully practiced gender-based discrimination by offering male ministers higher salary and other benefits. Rather than deciding the constitutional question of whether the statute had a valid secular purpose and primary effect, the Fifth Circuit sustained the dismissal of the plaintiff's complaint on the strength of the principle that a secular court should not attempt to resolve civil disputes which engage the court "in the forbidden process of interpreting and weighing church doctrine."[79] As Judge Coleman stated:

> An application of the provisions of Title VII to the employment relationship between...a church and its minister would...cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern.... The Church would then be without the power to decide for itself, free from state interference, matters of church administration and government.
>
> Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment.[80]

Limiting its decision to the specific factual pattern before it, the Court ruled that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to

regulate the employment relationship between church and minister."[81]

In the only other reported decision involving section 702, a direct challenge was made to the legitimacy of the broad exemption enacted by Congress in the 1972 version of this provision. In King's Garden, Inc. v. FCC[82] an applicant for employment at a radio station owned and operated by a religious organization complained to the Federal Communications Commission that the station had unlawfully discriminated against him on the basis of religion. The job applicant had been asked questions such as "Are you a Christian?" and "Is your spouse a Christian?". The Commission ruled that the religious organization could ask such questions only of "persons hired to espouse a particular religious philosophy over the air."[83] On appeal the religious organization argued that the 1972 amendment to Title VII required that the FCC amend its rules which bar broadcast licensees from discriminating in employment on the basis of religion[84] to allow religious preference in hiring by a religious corporation, association, educational institution, or society.

Judge Skelly Wright, currently the Chief Judge of the D.C. Circuit, wrote the opinion of the Court which rejected the radio station's contentions. In reaching the conclusion that the religious corporation was not exempt under the Act from the general ban against employment discrimination on the basis of religion, Judge Wright relied in part on the legislative history of the statute, noting that Congress had given "absolutely no indication that it wished to impose the [702] exemption upon the FCC"[85] and that "the sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges

to discriminate on religious grounds in the hiring of all of their employees."[86]

Although Judge Wright grounded his decision on the power of the FCC to regulate with respect to broadcasting, he added a detailed constitutional analysis of the statute which has ramifications for religiously affiliated higher education as well as for broadcasting. In this section of his opinion Judge Wright wrote: "The 1972 exemption is of very doubtful constitutionality."[87] The judge opined that the statute could not be sustained under the No-Establishment Clause of the First Amendment and that it would not withstand equal protection analysis under the Fifth Amendment. Employing the familiar tests enunciated by the Supreme Court in First Amendment cases, he wrote that neither he nor his colleagues, Judge Bazelon and Judge Wyzanski, could conceive of a valid secular purpose served by the "unbounded exemption" of the 1972 amendment which did not require a showing that the job involved a religious activity of the religious corporation. Secondly, he intimated that the statute would fall under the primary effect test as well, for the 1972 exemption "invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion."[88] In creating a "gross distinction between the rules facing religious and non-religious enterpreneurs," he concluded, "Congress placed itself on collision course with the Establishment Clause."[89] Finally, Judge Wright asserted that the statute worked an invidious discrimination prohibited by the Due Process Clause of the Fifth Amendment. For, in his opinion, "the criterion of discrimination - i.e., the religious or nonreligious character of the owning or

operating group - not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect."[90] Judge Wright then ruled that under the applicable rules of the FCC, the radio station was prohibited from engaging in sectarian hiring of persons not involved in the process of articulating a particular religious philosophy over the air.[91]

Judge Bazelon, who was the Chief Judge of the D.C. Circuit at the time the opinion was written, concurred in the judgment of the Court, but added an opinion stating that he disagreed with Judges Wright and Wyzanski as to the method they had used to avoid constitutional adjudication. Persuaded that the FCC cannot "impose employment requirements in direct conflict with the standards established by Congress,"[92] and stating that he was convinced by Judge Wright's constitutional analysis of the statute, Judge Bazelon stated that he would hold the exemption unconstitutional. The decision of the D.C. Circuit was appealed to the Supreme Court, but the Court let the decision stand by denying the writ of certiorari.[93]

Neither McClure nor King's Garden involved a religiously affiliated college. But if applied to the context of the employment policy of such a college, McClure would support the BFOQ exception, which is available when there is a demonstrable nexus between a particular job and the religious mission of the college. For example, under McClure, it seems clear that a religiously affiliated college may take into account the church membership or religious orientation of a campus minister or a theology professor. Under King's Garden, however, such a college could not rely on section 702 or 703(e)(2) to exercise religious preference in relatively low level staff

positions which do not implicate the employee in the religious mission of the college in a demonstrable fashion. Under those circumstances, it would seem that the generalized right of the employee to be free from religious discrimination in the job market would probably prevail over a Free Exercise claim asserted by a religiously affiliated college.

In McClure, moreover, the Fifth Circuit made it clear that its reading of the legislative history of the 1964 version of section 702 compelled the conclusion that:

> Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex, or national origin....[94]

The same result moreover, is supported by the section-by-section analysis of the 1972 bill, as amended by the Conference committee. This analysis, entered into the record by the Senate floor manager of the bill states:

> The limited exemption from coverage in this section for religious...educational institutions...has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities. Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.[95]

Despite the apparent clarity of the legislative history, however, a conflict over this issue appears to be emerging in the federal courts, at least at the district court level. For in EEOC v. Pacific Press Publishing Assn.,[96] Judge Renfrew issued a preliminary injunction ordering a Seventh-day Adventist publishing house not to terminate the employment of two workers who had brought a Title VII sex discrimination suit against the employer, until the lawsuit was resolved or until the plaintiffs were "disfellowed or censured by official action of [their] local church."[97]

Aware of the constitutional difficulty in compelling a church related corporation to employ religious dissidents, Judge Renfrew explicitly noted that the defendant was not bound by his order to assign the two plaintiffs to editorial responsibilities.[98] As part of his conclusions of law, Judge Renfrew ruled that the defendant was a religious corporation within the meaning of the section 702 exemption and that this provision permitted "the Press to discriminate on the basis of membership or nonmembership in the Seventh-day Adventist denomination," but that it did not "permit [the] Press to discriminate on the basis of race, color, sex, national origin, or the exercise of any right protected by [Title VII of the 1964 Civil Rights Act]".[99] Finally, the judge ruled that the press was "not exempt from compliance with 42 U.S.C. §2000e-2(a) or 3(a) by virtue of the First Amendment to the United States Constitution."[100]

In sharp contrast, however, Judge Harold Cox ruled in EEOC v. Mississippi College [101] that section 702 constitutes a complete bar to the exercise of EEOC investigative power in the context of an allegation of sex discrimination by a religiously affiliated college. Although the college did not deny the charging party's allegation of sex bias, it argued successfully that the Commission lacked power to investigate this charge, and Judge Cox refused to enforce the subpoena sought by the Commission. Although the defendant college clearly falls within the section 703(e)(2) exception,[102] Judge Cox relied on the 702 exemption for his conclusion that "this petitioner [the EEOC] is not given any power or any authority even to seek evidence to establish [the] facts in seeking to determine whether or not it has jurisdiction of this case.... [T]he petitioner does not have jurisdiction even to

maintain its investigation."[103]

The EEOC has appealed this ruling to the Fifth Circuit. In the light of that Circuit's reading of the statutory history of section 702 in McClure, it is difficult to see how the trial judge's ruling could be sustained. The very existence of Judge Cox's opinion may, however, serve as an incentive for Congress to clarify its intent that the exemption it has provided in section 702, authorizes religious preference but not racial or gender-based discrimination. If this occurs, Congress might also grasp the opportunity both to define more broadly the sort of religious affiliation or orientation which an employer must have in order to qualify for the 702 exemption, and to rethink its current posture that religious preference may be exercised by religiously affiliated colleges in filling all its positions of employment, without any regard for whether those jobs relate in any significant way to the religious mission or goal of the college.

At least one more question in this area is being tested by current litigation: how far a religiously affiliated college may go in the exercise of the entitlement in 703(e)(2) to "employ employees of a particular religion" without offending against the constitutional rights of these employees. This question is presented in Larsen v. Kirkham,[104] a case which has not yet come to trial, but in which the plaintiff alleged in her complaint that the defendant, Latter-Day Saints Business College, maintains an employment policy according to which "continued membership in the L.D.S. Church, upon their activity therein, espousal of faith in that church, and upon whether they are members of the male or female sex."[105] The plaintiff further alleged that "[f]emale employees

to a greater extent than male employees, are subjected to scrutiny and investigation of their personal lives, beliefs, background, espousal of faith, financial contributions, and church attendance,"[106] that her position as an English instructor was terminated by the college on the basis of reports that "her faith, her financial contributions, and her activity in the L.D.S. Church did not conform to the standards of the College with respect to female employees who are members of the L.D.S. Church,"[107] and that the College's refusal to reinstate her is based on the allegedly discriminatory practices mentioned above.[108]

The college's position is that the 703(e)(2) exception authorizes it to refuse to hire non-members of the church, to discriminate between members of the church on the basis of their sex, and to enforce church policies on employees who are of the church.[109] Denying that statute authorizes the broad scope of inquiry into the degree of her participation in the faith and activities of the church or into her financial contributions to the church, the plaintiff has sought declaratory relief invalidating section 703(e)(2) as unconstitutional.[110]

Despite the prospect that this constitutional claim will be urged upon the court, the Assistant Attorney General for the Civil Rights Division recently wrote to the United States Attorney for the District of Utah indicating that the Justice Department would not participate in this litigation.

If the plaintiff's complaint is dismissed, the McClure rationale will have been broadened significantly for this case does not involve the relationship between an ordained minister and her church, but the conditions of employment of an English instructor at a

church related college. If, however, the plaintiff's position prevails at trial and upon appeal, the position of the D.C. Circuit in King's Garden will be strengthened, for another circuit will have imposed limits on the scope of sections 702 and 703(e)(2) which Congress has not yet deemed necessary.

(3) ADMINISTRATIVE REGULATIONS

In addition to scrutinizing case law for rules governing the employment policies of church related colleges, the Sloan Commission should also consider the impact which federal administrative and regulatory agencies have on these colleges as they perfrom their function of carrying out various legislative mandates.

(a) EEOC DECISIONS

The obvious beginning place is the Equal Employment Opportunity Commission, which in the recent reorganization of the Executive branch has received enlarged jurisdiction over the enforcement of all federal civil rights policy in the employment area. This portion of the study will focus first on the interpretation given by officials in the EEOC to the section 702 exemption and the parallel exception in section 703(e)(2), as well as to the religious BFOQ exception of section 703(e)(1). It will then review the enforcement of Executive Order 11246, as amended, dealing with employment discrimination and affirmative action in federal contracting. Finally, this section will look briefly at the potential impact which the Internal Revenue Service might have on religiously affiliated colleges as it administers the federal tax policy.

The authors of this study are aware of no EEOC decision applying section 702 or 703(e)(2) to a religiously affiliated college in the context of a policy or practice to exercise religious preference in the hiring and promotion of faculty and other personnel. But the Commission has relied on these provisions in a case involving a charge of unfair employment practice against a Christian school at the pre-elementary level for its refusal to hire the charging party because of her Jewish religion. Noting that the school provides to pre-school through second grade children "educational opportunities undergirded by sound Christian principles and teachings as found in the Bible," the Commission found that the school met both prongs of the 703(e)(2) test: it was "wholly owned, supported, controlled, and managed by the Church;" and religion occupies "an integral part of the child's daily life at school." Citing both section 702 and section 703(e)(2), the Commission ruled that there is no reasonable cause to believe that Charging Party and other Jewish applicants are "unlawfully excluded by the school from consideration of hiring and actual hiring because of their religion."[111]

The other major exception found in Title VII, the BFOQ exception of section 703(e)(1), like the parallel provisions in sections 702 and 703(e)(2), has not been the subject of many reported decisions by the EEOC. The only such case of which we are aware is a determination letter issued in 1977 by an EEOC District Director ruling that a religiously affiliated college in California could rely on the BFOQ exception in a case involving the hiring of a biology professor, partly because of that person's religious affiliation.

In order to assess this interpretation of the BFOQ exception, one must first inquire whether this exception was intended by Congress to be construed broadly or narrowly. In considering the legislative history of the Civil Rights Act of 1964, it should be kept in mind that the House version of that Act was an "omnibus" civil rights bill which contained a full title on equal employment opportunity. By contrast, the Senate version contained only legislation concerning equality of access to public accommodations. Rather than refer the House Bill to the Senate Judiciary Committee, then dominated by Southern Democrats opposed to any new civil rights legislation, Senator Mansfield moved to send the House passed version directly to the Senate floor.[112] There is, accordingly, no Senate Report on what eventually became Title VII of the Act. The best source of quasi-official commentary on the meaning of language in this Title, then, is undoubtedly the Report of the House Judiciary Committee submitted by Congressman Peter Rodino. This Report stated that the BFOQ exception was "very limited" and was available to an employer only in "those rare situations where religion or national origin is a bona fide occupational qualification."[113]

Taking its cue from this congressional characterization of the BFOQ exception, the EEOC has announced that it intends to construe the provisions of section 703(e)(1) strictly. The Commission first announced its rule of strict construction of the BFOQ exception in guidelines issued in 1970 concerning discrimination because of national origin.[114] Two years later the Commission issued guidelines on discrimination because of sex which stated that the BFOQ exception as to sex "should be interpreted narrowly."[115] In 1967 the Commission issued guidelines on discrimination because

of religion.[116] Although these guidelines refer explicitly to section 703(e)(1) of the Civil Rights Act, they address only the concept that an employer must make reasonable accommodations to the religious needs of their employees[117] and remain curiously silent about religion as a BFOQ in the hiring process.

In sum, the BFOQ exception has been of limited utility to religiously affiliated or committed colleges, both because the EEOC has never publicly issued any guidelines concerning this exception, and because the EEOC and the federal courts have construed the other BFOQ exceptions relating to sex and national origin so narrowly.

In the light of this history both of legislative intent and of administrative rule-making, it is possible to assess the explicit reliance on section 703(e)(1) by the director of the EEOC in the case mentioned above. As was stated above, the EEOC official dismissed an unfair employment practice allegation lodged against a Roman Catholic university in California. The charging party was a non-Catholic applicant for a position in the biology department who maintained that although he was qualified for the position, the university refused to hire him because of his religion. The university denied the charge, and stated that he was placed in the second-rank candidates on the basis of his qualifications. The university, however, contended that it was entitled to take the religious factor into consideration because of a serious imbalance of non-Catholic scholars in the biology department.[118] Throughout the investigation of the complaint the university had not argued for a BFOQ exception. Rather its position was that although it did not seek an all-Catholic faculty or administration,

it "does seek to maintain its existence as a Catholic institution, and for this, a certain 'critical mass' of Catholics is deemed essential."[119]

The district director did not adopt the "critical mass" theory urged by the university, but based his conclusion that "there was no reasonable cause to believe that a violation of Title VII occurred" on the evidence that the university's hiring policy "allows for a bona fide occupational qualification defense."

In the view of the authors of this study, the district director reached the right result, but for the wrong reason. On a fair reading of the language of section 703(e)(2), the college is authorized by Congress to hire employees of a particular religion. Hence there was no need to strain the meaning of the 703(e)(1) exception for a religious BFOQ by applying it to the hiring of a biology professor. In short, while the legislative history of section 703(e)(2) allows a somewhat expansive interpretation, the same history narrowly limits the BFOQ exception to "rare situations." The district director's interpretation of the religious BFOQ exception, moreover, cannot easily be reconciled with the Commission's guidelines concerning discrimination because of sex or national origin, for those guidelines state that the BFOQ exception shall be strictly or narrowly construed.

Another factor in this case severely limiting its practical utility is that it is not only unreported in any of the commercial publications dealing with equal employment opportunity, but also does not seem to have been heard of in the Washington office of the EEOC. Under these circumstances, the case can be of no significant benefit to college administrators, private plaintiffs, or to governmental officials confronting similar problems. If the Commission wishes to

adopt the policy espoused by one of its district directors, it would be far preferable if it employed the administrative rule-making process and announced guidelines in the Federal Register explaining the circumstances under which a religious BFOQ exception would be available. Such guidelines would be useful even if the Commission chose not to adopt the broad interpretation of the religious BFOQ exception espoused by the district director in the determination of the case discussed above. In short, administrators at religiously affiliated or committed colleges who must formulate and carry out their hiring policies are entitled to a clearer perception of the Commission's intent on the scope, whether narrow or broad, of the religious BFOQ exception.

(b) EXECUTIVE ORDER 11246 AND OFCCP REGULATIONS

Another area of administrative regulation impacting upon all religiously affiliated colleges which maintain contracts or subcontracts with the federal government is the enforcement of Executive Order 11246, as amended.[120] This Executive Order requires virtually all contracts or subcontracts with the federal government to include a nondiscrimination clause, according to which the contractors agree as follows:

> (1) The contractor will not discriminate against any employee or applicant for employment because of...religion.... The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their... religion....[121]

The penalty for noncompliance with the nondiscrimination clause is cancellation, termination or suspension of the contract(s) in whole or in part and declaration that the contractor is ineligible for further contracts with the federal government.[122]

While the Executive Order was enforced according to these terms, officials at church related colleges and universities complained to the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor and to the Congress that these provisions laid more onerous obligations on the colleges than did the terms of the civil rights legislation, and that, as applied to the exercise of religious preference in the recruitment and selection of faculty, they abridged the constitutional rights of these colleges to free exercise of religion and freedom of association.[123]

In response to these complaints, in 1975 OFCCP amended its regulations construing the relevant Executive Orders. The governing regulations now follow almost verbatim the language of the exemption in section 703(e)(2) of the Civil Rights Act:

> It shall not be a violation of the equal opportunity clause for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of the particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted.[124]

Another regulation prohibiting employment discrimination on the basis of religion or national origin was amended at the same time to eliminate any possibility of an administrative interpretation conflicting with the language of the above regulation.[125]

The difficulty with the Department of Labor's administrative rule on this subject is three-fold. First, the text of the Executive Order itself was not amended to conform to the interpretation announced by the Department in 1975. Secondly, one consequence

of tracking the language of section 703(e)(2) of the Civil Rights Act is that the Department's interpretation does not extend an exception to those religiously affiliated or committed colleges which cannot accurately be described either as "owned, supported, controlled, or managed by a particular religious corporation, association, or society" or as directed in their curriculum "toward the propagation of [a] particular religion." And thirdly, the regulation does not take into account the constitutional limits cautioned by Judge Wright in the King's Garden.

It is not clear from the scanty information in the Code of Federal Regulations that the Department of Labor in 1975 intended to impose the ban on religious preference in hiring associated with a federal contract to those religiously affiliated colleges not covered by the language of the regulation. Nor is it evident that the Department consciously chose to ignore the narrower interpretation of the scope of religious preference which Judge Wright thought to be constitutionally required, for there is no evidence in the record that the Department was ever made aware of the King's Garden case. With the recent consolidation of the contract compliance program within the Department of Labor,[126] the Secretary of Labor may be receptive to the suggestion that it undertake the issuance of a consistent set of standards which offers clear guidance to administrators at religiously affiliated colleges concerning the permissible scope of religious preference in employment practices at these institutions.

If this sort of guidance is to be useful to college administrators, there must be clarity not only concerning the employment policies required by the Executive Order but also concerning the prior question of whether the Order in any way affects colleges

which enroll students entitled to receive federal assistance of various forms but which as a matter of policy decline to receive direct institutional assistance so as to deny the jurisdiction of the federal government to regulate under the Taxing and Spending Power.[128] This question will be explored more fully in chapter nine, dealing with Title IX regulations governing sex discrimination in federally funded educational programs. But it should be noted here that Executive Order 11246 speaks of "contracts" and "sub-contracts" without specifying what is meant by those terms.[129]

(c) IRS RULINGS AND REGULATIONS

A third instance of a federal agency which has at least the potential to affect the employment policy of church related colleges is the Internal Revenue Service. For by issuing a revenue ruling or a revenue procedure concerning the tax-exempt status of these institutions under section 501(c)(3) of the Internal Revenue Code, the Service could dry up a major source of the financial support upon which these institutions rely for their survival: tax-deductible contributions.

To date, however, the IRS has not adversely affected these colleges by issuing any regulation affecting their ability to exercise religious preference in their employment practices. And it seems highly unlikely to do so in the future. This prediction seems probable because of the rationale relied upon by the IRS when it announced its decision in 1971 denying tax-exempt status to schools which maintain a racially discriminatory policy as to their students. The ruling referred to the general common law governing charitable trusts and stated that an organization would not qualify as charitable if its activities were either illegal or contrary to public policy.[130]

It seems clear from the above review of federal civil rights legislation that there is no public policy against the exercise of religious preference in employment by religiously affiliated colleges, at least with respect to positions implicating the religious mission of the college. On the other hand a review of the same statutes discloses a clear policy against racial discrimination in education.[131] Hence it would not be irrational or inconsistent for the IRS to uphold tax-exempt status in the former instance while denying it in the latter.

In 1975 the IRS issued guidelines for determining whether private schools qualify for tax-exempt status on the basis of the school's policy on racial nondiscrimination in student admissions. Included in these guidelines was a statement on employment of faculty and administrative staff as an indicator of the school's policy with respect to students:

> The existence of a racially discriminatory policy with respect to employment of faculty and administrative staff is indicative of a racially discriminatory policy as to students. Conversely, the absence of racial discrimination in employment of faculty and administrative staff is indicative of a racially nondiscriminatory policy as to students.[132]

It should be repeated that neither the 1971 revenue ruling nor the 1975 revenue procedure dealt directly with religious preference in faculty hiring. Because the IRS has dealt with the tax-exempt status of private schools chiefly in the context of student admissions, the potential impact of the IRS on church related colleges will be treated in greater detail in chapter 3 of this study.

D. POLICY RECOMMENDATIONS

In the opinion of the authors of this study, the 1964 Civil Rights Act, as amended by the 1972 Equal Employment Opportunity

Act, is at once too narrow because it fails to provide coverage for institutions which deserve statutory protection and too broad because it grants a religious exemption even in instances where there is no apparent religious motivation or justification for doing so. Attention must, therefore, be paid to careful revision of the statute.

As described in detail above, the current provisions of Title VII contain a general prohibition against employment discrimination because of religion[133] (section 703(a)), an equally general exemption from all the provisions of Title VII available to any "religious...educational institution...with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such...educational institution... of its activities,"[134] and two exceptions: a "very limited" exception for a religious BFOQ available broadly to any employer[135] and a second exception which allows the hiring of any employees of a particular religion available only to colleges which meet either of the following two statutory standards: (1) that the college is "in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society," or (2) "if the curriculum of such...college [or] university...is directed toward the propagation of a particular religion."[136]

It should be noted that Congress chose to enact both an exemption and two exceptions, all of which may apply to the employment policies of educational institutions which are religious in character. The first thing which should be noted, then, is the difference between an exemption and an exception. An exemption has the obvious

advantage to the person or institution which qualifies under its terms that it need not inquire further into the other provisions of the Act. For example, if an institution is tax-exempt under section 501 of the Internal Revenue Code, it need pay federal income tax only with respect to that portion of its income which is unrelated business.[137] An exception, by contrast, is more analogous to a tax deduction which must be itemized and which by that fact alone may be subject to closer scrutiny by a governmental official.

In the light of this distinction we suggest that the Commission recommend to the appropriate Committees of the Senate and the House the drafting of a bill which would retain an exemption for religiously affiliated colleges from the generalized prohibition against employment discrimination on the basis of religion. We suggest that the language of section 703(e)(2) is unhelpful for this purpose both because it does not accurately reflect the variety of relationships between church and campus that obtain among institutions of higher education which are religious in character, and because its description of the orientation of the curriculum of colleges eligible for the Title VII exception is virtually coterminous with the description of church related schools which the Supreme Court has found pervasively sectarian and thereby ineligible for public assistance.

Language more suitable for the purpose of identifying the institutions entitled to a statutory exemption is that found in analogous provisions of the Internal Revenue Code. In describing an "integrated auxiliary" of a church, for example, section 6033(a) of the Code speaks of an organization which is "operated, supervised,

or controlled by or in connection with a religious organization"[138] as described in section 501(c)(3). In clarifying the term "integrated auxiliary," the IRS recently stated that one of the characteristics of an integrated auxiliary is its affiliation with a church. Throughout this study the term "religiously affiliated colleges" has been used to describe a variety of relationships between church and campus. If a more precise delineation of "affiliated" is required, it seems to the authors of this study to be legitimate to draw by way of analogy on the definition given to the term "affiliated" by the IRS:

> [T]he term "affiliated" means either controlled by or associated with a church or with a convention or association of churches. For example, in organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church.... An organization is associated with a church...if it shares common religious bonds and convictions with that church....[139]

The regulation of the OFCCP cited above might provide another fruitful source of language to describe the sorts of institutions to which an exemption from the ban on religious preference in employment practices should be available. For in purporting to harmonize the conflicting standards of Executive Order 11246 and the exemption and exceptions of Title VII, the OFCCP regulation states:

> The primary thrust of this provision is directed at religiously oriented church related colleges and universities and should be so interpreted.[140]

One of the chief advantages of this kind of language is that it partakes of the felicitous ambiguity of which Edward Levi wrote in his Introduction to Legal Reasoning.[141] The very generality of the language enables reasonable administrators to discern a difference between a college which, on the one hand, is religious

in character (in the language of the Tax Code, "affiliated with" or "associated with" a church, or in the language of the OFCCP regulation, "religiously oriented") and one which, on the other, is "owned, supported, controlled, or managed by a particular religion." This first category embraces the second, but not vice versa. Since all colleges arguably included in the more general category merit a statutory exemption if they are to be permitted to carry out the religious goals and values associated with those kind of colleges, the more general category should be operative in any revision of the statute.

As stated above, it is the opinion of the authors of this study not only that the existing statute is too narrow with respect to the employers for whom an exception is provided, but also that it is too broad with respect to the employees as to whom religious preference may lawfully be exercised. If an institution may be said to have a right to exercise religious preference in hiring people related to the carrying out of its religious mission or goal, it is no less true that individuals retain a right to be free from the residual vestiges of religious bigotry which has so flawed this country's history that Mr. Justice Powell felt compelled to issue a judicial warning about the subject as recently as the Bakke case.[142] Because some types of religious institutions often have a considerable impact on the economic life of the community in which they live, Congress has the power under the Commerce Clause to enact legislation which would limit the exercise of religious preference by church related institutions to those positions which are demonstrably related to the religious character or identity of the institutions.

According to Judge Wright in King's Garden, "[f]rom 1964 to

1972 Congress had...a firm purchase of the tightrope" between the two religion guarantees protected by the First Amendment.[143] But the 1972 amendment to section 702 of the Civil Rights Act had the effect, in his view, of sheltering "myriad 'activities' which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees."[144]

Members of Congress, no less than members of the Judiciary take an oath to support the Constitution of the United States. Some commentators have seen in this ritual a powerful statement that it is quite legitimate, and even necessary, that legislators make an initial determination as to the constitutionality of its enactments. Congress has given no indication that the language of the 1972 amendment to Title VII was crafted intentionally to provoke an interbranch confrontation with the Judiciary,[145] for this Act became law before King's Garden was decided. There is no need, then, to approach Congress gingerly for fear of stirring up "dubious battle" between Congress and the federal courts. It would suffice for the Sloan Commission to advise Congress to rethink its posture concerning the rights and entitlements of employees or potential employees at religiously affiliated institutions, for these workers deserve the benefit of statutory protection no less than the religious institutions which are or which might become their employers. Because the rights of both employers and prospective or actual employees are so significant, and because religious rights are often fragile and controversial, the appropriate committees of the Congress should be urged to give ample notice to all parties interested in this subject, to elicit their participation in plenary hearings before the statute is revised.

The section 703(e)(1) exception also merits the scrutiny of the Sloan Commission. It is not apparent to the authors of this study that the religion BFOQ has been of much value as a legal tool to protect the interests of religiously affiliated colleges in their hiring practices. We are aware of no instance other than the unreported determination letter mentioned above in which this exception has been relied upon by the EEOC to support a finding that a religiously affiliated college may exercise religious preference in the hiring of its faculty. It is significant that the university in this case did not rely on the BFOQ exception, but urged the acceptance of the "critical mass" theory. Two reasons may account for the university's posture. The exception is job-specific and therefore of limited utility in carrying out a campus-wide hiring policy which contemplates religious preference. Secondly, the institution would normally have the burden of showing that religion is a bona fide occupational qualification "reasonably necessary to the normal operation of [the] particular business or enterprise."[146]

Before suggesting a policy proposal for the Commission to consider, it should be noted that equal employment law entertains a distinction between the BFOQ exception and the defense of business necessity, even though such a distinction does not leap out from the language of the statute. The distinction has been illustrated in the area of sex discrimination by the authors of a leading case book on equal employment law:

> BFOQ arises only where the employer takes adverse action against or excludes males or females because of their sex: no females may work in the warehouse because the job involves lifting 100 pounds; no female with reproductive capacity may work with lead. The business necessity defense comes into play where the employer has a criterion for work in the warehouse that applicants must

> be able to lift 100 pounds. A rejected female applicant then claims that this is sex discrimination because it has a disparate impact on females. The employer then raises a business necessity defense, under which he must prove that the ability to lift 100 pounds is in fact reasonably necessary to performing the warehouse job.[147]

Though the distinction between BFOQ and business necessity is at times subtle, the main point of the distinction can be put simply: the BFOQ exception attends not only to what a person can do, but also to what he is. This distinction may be illustrated by the following hypothetical situations. College A, affiliated with a Southern Baptist Convention, excludes Roman Catholics from their religious studies department for a variety of reasons such as the following: (1) many of the students in this department aspire eventually to become Baptist ministers and the college wishes them to have persons in that role model available to the student on a regular basis, or (2) the orthodoxy of coreligionists is more probable than with members of another religious tradition, or (3) the constituency of the sponsoring religious body which provides financial and other support to the college expects that the college will employ only Southern Baptists to teach religion. This would appear to be a perfectly acceptable BFOQ exception.

College B, a Roman Catholic university, needs to fill a position in its theology department and advertises that applicants must be familiar with the corpus of St. Thomas Aquinas. A Protestant theologian who is well qualified as a Patristics scholar but unfamiliar with Aquinas applies and is not hired. He then files an unfair employment practice charge with the EEOC, alleging that the requirement of familiarity with the writings of Aquinas has a disparate impact upon non-Catholics. Assuming that section

703(e)(1) were the only legislation on the books, the university would still prevail by raising the defense of business necessity.

The application of the BFOQ exception or the business necessity defense to jobs which are not demonstrably linked with the religious mission or goals of the college appears to the authors of this study to be dubious as a matter of law, and therefore insufficient to protect the legitimate interests of religiously affiliated colleges. In any event, we think that it is anomalous that the EEOC has announced guidelines on the other two BFOQ exceptions in the statute, sex and national origin, but not on the religion BFOQ exception.

To this end, we submit the following draft text of such a guideline:

> 29 CFR §1604.2 RELIGION AS A BONA FIDE OCCUPATIONAL QUALIFICATION.
> (a) "The Commission is aware of the legitimacy of the claim of religious societies, corporations, and associations, especially religiously oriented independent schools, colleges, universities, and of other educational institutions affiliated or associated with a church or association or convention of churches, to maintain their religious integrity and autonomy by employment policies which prefer employees or prospective employees because of any of the following criteria: membership in a religious body, religious orientation, respect for religious traditions, or profession of ethical convictions which are religiously based.
> (b) "The Commission is also aware of instances of employment discrimination because of religion which do not appear to be related to the legitimate interests of the institutions described in section (a) of this regulation.
> (c) "In conformity with its announced guidelines on sex as a bona fide occupational qualification, see 29 CFR §1604.2, and on national origin as a bona fide occupational qualification, see 29 CFR §1606.1(a), the Commission believes that the bona fide occupational qualification exception as to religion should be interpreted narrowly and will not be available to an employer unless the employer shows a clear nexus between the employment position and a business necessity for filling that position with a member of a particular religious body or with a person of a particular religious orientation,

or who manifests respect for religious traditions, or who professes ethical convictions which are religiously based.

(d) "Nothing in this regulation shall be construed to preclude any employer from raising defenses other than the bona fide occupational qualifications which may be available to them. AUTHORITY: Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e-12

CHAPTER THREE

RELIGIOUS PREFERENCE IN STUDENT ADMISSIONS POLICIES

A. THE DATA

Although a significant percentage (13.1%) of the respondents to the Center survey indicated that as a matter of policy they do not accept institutional assistance from the federal government, all of these respondents acknowledged that students who attend their institutions receive some form of federal assistance.[1] This finding confirms the data in a 1976 survey among the constituency of the American Association of Presidents of Independent Colleges and Universities, in which all but 2 of 85 respondents (97.7%) indicated that their students received some form of public assistance.[2] It is conceivable, then, that Congress might attempt to regulate the policies of colleges which are indirect beneficiaries of this student assistance in the sense that students who receive grants or loans which are in some sense subsidized by the federal government use those funds to pay tuition and other expenses at the colleges they attend. In any event, Congress has never attempted to rely on this exercise of its funding power to attach direct conditions on religiously affiliated colleges prohibiting or inhibiting their exercise of religious preference in student admissions.

Legislators contemplating such a change in federal policy would, of course, have to overcome a series of constitutional arguments which run counter to the legitimacy of such a measure.[3] In addition, as a matter of practical politics, they should take into

account two important conclusions from the Center survey. Of those expressing an opinion concerning the ability of religiously affiliated colleges to exercise religious preference in selection of their student bodies, without thereby forfeiting their entitlement to receipt of public benefits, 71.8% expressed agreement and 28.2% expressed disagreement.[4] When, however, these institutions were asked whether as a matter of practice they exercised such religious preference, only 29.1% indicated that they did and 70.9% indicated that they did not.[5]

B. A RATIONALE FOR RELIGIOUS PREFERENCE IN STUDENT ADMISSIONS POLICIES

As was stated above, there is no clearly articulated federal policy on religious preference in student admissions similar to the ban on religious discrimination in employment found in Title VII of the Civil Rights Act of 1964. The absence of a federal policy on this matter is not fortuitous. Title VI of the Civil Rights Act of 1964 articulates the general principle that "no person...shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[6] It is highly significant that the term "religion" does not occur in Title VI, for this omission stands in sharp contrast to the inclusion of the term in the prohibition of religious discrimination in public accommodations (Title II) and in employment (Title VII).[7]

That this was the actual intent of Congress and not a drafter's error may be inferred as well from subsequent civil rights legislation. For when Congress enacted Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act because of

its ban on housing discrimination, it explicitly provided an exemption allowing a religious group to limit or to give preference "to persons of the same religion" in the sale, rental or occupancy of dwellings owned or operated by the religious group for a non-commercial purpose.[8] And when in 1972 it added sex to the list of illegitimate grounds of exclusion from participation in federally funded programs, religion was not added as a similarly unlawful basis for discrimination.[9]

There are, moreover, strong reasons supporting this deliberate refusal by Congress to lump religion together with race, color, national origin, and sex. One such reason is that to do so would create unwarranted intrusion by the government in the internal workings of a church related educational endeavor, a result which is prohibited by the Religion Clauses of the First Amendment.

This point of this argument is not that many religiously affiliated colleges exercise religious preference in choosing their students, for the Center survey indicates that most do not. It is rather the point that the government has no business telling such institutions that they cannot exercise this kind of religious preference if they choose to do so. This point is made all the more forceful by the fact that many small religiously affiliated colleges have experienced declining enrollment in the past decades and several, as a consequence, have had to close their doors permanently.

Despite these harsh realities, however, there remain many administrators at religiously affiliated colleges who have resisted the impulse to survive by broadening the base of their student body significantly beyond the membership of the church to which the college is connected. These administrators have preferred to assert

their religious distinctiveness as a more significant value than the success of the institution measured in terms of the size of its student body. For example, the acting director of research and institutional studies at Valparaiso University, Gary A. Greinke, recently recommended that Lutheran colleges should maintain their prevailing admissions standards giving preference to Lutheran students, even if this policy would have the effect of decreasing enrollment at these institutions in the late 1970's. In his update of Francis C. Gamelin's 1970 study of Lutheran colleges and universities,[10] Dr. Greinke asserted:

> IT IS NECESSARY FOR A COLLEGE TO MAINTAIN ITS REPUTATION AND SENSE OF MISSION AND THIS SHOULD NOT BE SACRIFICED FOR NUMBERS OF STUDENTS. LIMITING ENROLLMENTS CONSISTENT WITH INSTITUTIONAL MISSION WILL ALLOW AN INSTITUTION TO MAINTAIN A DISTINCTIVE PURPOSE.
>
> Some institutions already have a limited Lutheran enrollment. In fact, in some cases, Lutherans are a relatively small minority. Apparently some institutions view their Lutheran affiliation as nominal. The data suggest there are a number of institutions which have from 30 to 60% Lutheran students. These institutions are at a critical juncture in their history. If Lutheran affiliation is to permeate the lifeblood of an institution, it will be necessary to retain a solid core of Lutheran students.... While non-Lutherans should never feel excluded on a campus, nevertheless, the Lutheran spirit of scholarship, inquiry, and quest for moral and social implications of issues should never be compromised. If an institution is to be distinctive and unique, it must foster and support essential characteristics which make it unique.[11]

No generalization can be made about the religious character of students enrolled at religiously affiliated colleges. Rather, it is for each denomination engaged in higher education, and more locally still for each religiously affiliated institution of higher education to determine whether and how it wishes to exercise religious preference in the selection of those who make up its student body.

Secondly, a dramatic increase of the federal government's role in determining the specific admissions policies of colleges and universities would contravene the general character of the American constitution, which authorizes the federal government to act only according to the powers enumerated in the instrument and which leaves to the states and to the people the enjoyment and exercise of all other rights. Under Article I, Clause 8, section 3, for example, Congress has authority to regulate the employment policies and practices of colleges and universities to the extent that these institutions affect or have an appreciable impact on commerce among the several states. But there is no similar warrant for Congress to regulate the admissions policies of educational institutions in detail unless the General Welfare Clause (Art. I, Cl. 8, §1) is to be regarded both as a repeal of the Ninth and Tenth Amendments and as an overturning of Dartmouth College v. Woodward.[12]

Justice Frankfurter undoubtedly overshot the mark when he stated in Sweezy v. New Hampshire that one of the essential components of academic freedom has been the right of the academic institution "to determine for itself...who may be admitted to study."[13] The very source Frankfurter cited in Sweezy betrays the overbreadth of his assertion, for the Justice relied on the statement of a conference of scholars from two South African universities which, because of the policy of apartheid in South Africa, are closed to balck students. To be sure, Frankfurter himself acknowledged that racial discrimination might be a factor limiting the right of an institution "to determine for itself...who may be admitted to study," for he had joined a unanimous court in Brown v. Bd. of Education in the historic rejection of the "separate but equal" standard as applied to public schools. Once again, however, it is necessary to be discriminating

about discrimination. For the Brown exception to the general rule later endorsed by Frankfurter in Sweezy was a clear exception precisely because it involved invidious racial discrimination.

Two recent instances of federal involvement in the admissions policy of colleges and universities illustrate the importance of the ability to differentiate among discriminations. The first situation did not involve any allegation of racial discrimination. Shortly before adjourning to campaign for re-election in a presidential election year, the members of the 94th Congress passed the Health Professions Educational Assistance Act of 1976, section 771(b)(3), of which required as a condition for eligibility for capitation grants that American medical schools admit a quota of American students studying abroad who passed the first part of the National Medical Board examination.[14] The response in the university world was explosive:

> President Paul Reinert of St. Louis University urged President Ford to veto the bill because of this provision, and Presidents Kingman Brewster of Yale and Richard Lyman of Stanford spoke forcefully against it, indicating that their institutions would not accept funds that required the abrogation of their admissions standards.
>
> What had become clear to them and to others who joined the protest is that if the Congress has the power to impose such a condition for the receipt of funds and sees a sufficiently compelling reason to exercise it, then it can do so with respect to any part of the university.[15]

Section 771(b)(3) was repealed in the next Congress, and in its place there was enacted a face-saving compromise measure requiring medical schools receiving federal capitation grants to make a good faith effort to increase their third-year enrollment by 5% for one year, either by accommodating American nationals transferring from foreign medical schools or by following customary admissions procedures.[16] Congress appears to have learned that the academy will

guard jealously its prerogative of determining the composition of its community.

The second example, Regents v. Bakke,[17] is already familiar to the members of the Sloan Commission from the enormous amount of publicity and comment attending the decision. Without any desire by the authors of this study to add to the already voluminous literature about Bakke, we feel that it suffices for purposes of this study to note that even though it was the federal government which initiated affirmative action programs in the 1960's, there was a profound consistency between the above mentioned resistance to the federal government's attempt to identify a group of students which medical schools must accept and the insistence by the presidents of major independent universities in the Bakke case that they be allowed to carry out affirmative action programs voluntarily adopted by these institutions to redress prior systematic exclusion of minority students from professional studies.[18] In this vein the President of Brigham Young University, Dallin H. Oaks, stated recently:

> Scholarly comments and public debate about the Bakke case have also ignored the essential difference between public and independent institutions. This voluminous literature generally seems to assume that the Bakke decision governs the admission practices of all of higher education. But Bakke involved a public institution, and independent colleges and universities should have greater latitude in student admissions. An independent institution not receiving any direct assistance from tax appropriations should be free to have preferential admissions--even the kind of quotas the Bakke case outlawed for the University of California--to benefit racial and other minorities, if they choose to do so. The Bakke case does not hold to the contrary. Granted, this kind of latitude may be abused in some instances. But if private parties lack the freedom to make wrong decisions, they lack freedom indeed.[19]

In summary, then, these are at least two good reasons why Congress has not enacted a provision restricting the ability of religiously affiliated college to exercise religious preference in the selection of its student body. First, such a provision would offend against the Religion Clauses of the First Amendment. Secondly, it would constitute an unwarranted intrusion by the federal government into an area jealously guarded by academic institutions as the perimeter of their autonomy and integrity.

C. LEGAL ANALYSIS OF FEDERAL STANDARDS RELATING TO RELIGIOUS PREFERENCE IN STUDENT ADMISSIONS

Since there is no federal statute which prohibits a religiously affiliated college from taking into account the church membership or religious orientation of applicants for admission, the only legal standards which have emerged are rulings by the Internal Revenue Service not directly on point but useful by way of analogy, and dicta in the leading court decisions concerning the constitutionality of public funding of church related colleges. This section will deal first with the court cases and then with the IRS rulings.

(1) SUPREME COURT DICTA

In the opinion of the authors of this study the assertions by various Justices of the Supreme Court and other federal judges cannot be regarded as definitive judicial resolutions of the matter of religious preference in student admissions, for the formulations are often vague and contradictory. Although these dicta hardly amount to clear standards, they merit the consideration of the Sloan Commission if only because the casualness of these dicta suggests that more reflection must be given to this subject than the Justices

were prepared to give in the leading public funding cases.[20]

In Tilton the Court rejected the appellants' contention that the constitutionality of federal construction grants to religiously affiliated colleges should be decided on the basis of a "composite profile" of the "typical sectarian" institution of higher education. Within the profile argued by the appellants was the imposition of "religious restrictions on admissions."[21] Chief Justice Burger insisted, however, that the Court should focus on actual cases rather than on a hypothetical profile. On this analysis, he wrote that although the "student bodies at each [of the four colleges] are predominantly Catholic,...the evidence shows that non-Catholics were admitted as students...."[22] It is difficult to assess what weight this allusion to student admissions had in deciding whether federal construction grants to religiously affiliated colleges would create excessive entanglement between church and state and thus violate one of the Court's standards for adjudication of cases under the No-Establishment Clause. But presumably one of the ways in which religiously affiliated colleges may avoid being labelled as "pervasively sectarian" is to maintain a policy of admitting at least some (the Tilton plurality did not intimate how many) students of a different faith or ecclesial affiliation than that of the sponsoring religious body.

It should also be noted that Justice White, who has been one of the most forceful proponents of acceptable accommodation in Church-State litigation,[23] concurred in the judgment of the Court in Tilton but wrote a separate opinion which indicated that he would strike down legislation benefiting religiously affiliated schools on a showing that any of these schools "restricted entry

on racial or religious grounds."[24] Although no other Justice joined White in this opinion, it appears to have been accepted by some educators as the statement of a minimal standard for eligibility for public assistance,[25] if only because Justice White provided the fifth vote in favor of the religiously affiliated colleges involved in Tilton.

In Hunt the Court upheld the constitutionality of public assistance to the Baptist College at Charleston, South Carolina "despite some institutional rhetoric"[26] about its Christian character. Justice Powell added tersely:

> What little there is in the record concerning the College establishes that there are no religious qualifications for...student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina....[27]

The language of the "test" - if the term may be used lightly to include this kind of vague assertion - is tighter in Hunt than in Tilton: in Tilton the Court spoke only of the admission of some non-Catholic students to a Catholic college, while in Hunt the Court noted that the Baptist college had no religious qualifications for student admission and in fact admitted a percentage of non-Baptists roughly corresponding to the percentage of non-Baptists in the area of the college. Justice Powell concluded: "On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education."[28]

In Roemer the Supreme Court sustained the finding of the district court that the four Roman Catholic colleges in question were not so "pervasively sectarian" that noncategorical grants to them would run afoul of the No-Establishment Clause. Justice

Blackmun's plurality opinion[29] noted that this conclusion was supported by a "number of subsidiary findings concerning the role of religion on these campuses."[30] Among such findings was the following:

> The great majority of students at each of the colleges are Roman Catholic, but the District Court concluded from a "thorough analysis of the student admission and recruiting criteria" that the student bodies "are chosen without regard to religion."[31]

According to Justice Blackmun, then, a court reviewing a scheme of financial assistance to a religiously affiliated college might and perhaps should scrutinize the college's recruitment policies. And Blackmun even seems to assert that for such a college to remain eligible for public funding, it must choose its student body on a policy which is religiously non-discriminatory. It is scant comfort to many a church related college that Justice Blackmun allows that the mere fact that a majority of its student body are composed of adherents to the faith of the sponsoring religious body would not yield the conclusion that the institution is "pervasively sectarian."

In Smith v. Bd. of Governors of the Univ. of N. Carolina,[32] the Supreme Court summarily affirmed a lower court ruling which sustained a state tuition grant program, where students attending religiously affiliated colleges were predominantly members of the sponsoring church.[33] Among the facts which the district court chose to highlight was the fact that Belmont Abbey College (Catholic affiliated) does not inquire about the religious affiliations and preferences of student applicants.[34] But such a policy is surely not legally necessary, for the court also upheld grants to students attending Pfeiffer College (Methodist affiliated) where there is "extensive use of Methodist ministers in recruiting students."[35] The court noted further that 47% of the students

receiving scholarships granted by Belmont Abbey College were non-Catholics.[36] Once again, though, the Court drew no legal conclusion from this policy, for it noted that "some of Pfeiffer's privately established scholarship funds were established by Methodists, some of which impose religious restrictions upon the selection of recipients."[37]

In sum, a coherent federal policy on religious preference in student admissions can hardly be discerned from the cases cited above. Justice White seemed totally opposed to such preference in Tilton, while Chief Justice Burger and three other Justices seemed to think some such preference was permissible, but did not choose to state how much would be allowable before a judicial boom might be lowered on the authority of the No-Establishment Clause. Justice Powell in Hunt highlighted the fact that the colleges involved in that case maintained "no religious qualifications for student admissions" (similar to Justice White's standard) but encumbered his "test" with a bewildering mathematical component by noting that "only 60% of the college student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina." And in Roemer Justice Blackmun appears also to agree with Justice White when he makes something, if not much, of the lower court finding that the student bodies "are chosen without regard to religion." Of the four "tests" - if they were ever intended by their authors as such - which are inferrable from these dicta, Chief Justice Burger's is probably the best in that it at least allows religiously affiliated colleges to choose some of their students on the basis of religion. But in the opinion of the authors of this study, none of these dicta merit much more from

the Sloan Commission than polite demurral. The articulation of intelligent public policy on this matter simply requires more reflection than the Justices have yet given to it.

(2) FEDERAL TAX POLICY

In refreshing contrast to the bewildering and confused utterances of the Justices, the Internal Revenue Service has never so much as intimated that, in its function of determing the eligibility of schools as tax-exempt institutions and the deductibility of contributions to those schools, it has any reservations about the legitimacy and propriety of religious preference in the selection of students at religiously affiliated educational institutions.

As was mentioned above in chapter two, according to existing federal tax policy, a religiously affiliated college may exercise religious preference in faculty employment without jeopardizing its tax-exempt status. Similarly the Internal Revenue Service has not issued any ruling or regulation which would question the tax-exempt status of a college which openly practiced religious preference of students who are members of the religious body sponsoring the college. Until most recently the rulings issued by the IRS have been limited to discrimination on the basis of race.[38] The chief concern reflected in these rulings and regulations has been that a private school established to undermine the effect of the Court's teaching in Brown v. Bd. of Education should not do so with the assistance of the federal tax policy.[39] The tax-exempt status of a church related college would be placed in question only by a student admissions policy which, although nominally limited to religious preference, had the effect of racial discrimination, or perhaps only if there was a showing of a deliberate intent[40] to achieve such a result.

Thus in recent guidelines on the availability of tax-exempt status for schools maintained by a religious body, the IRS stated that it would deny tax-exempt status to such a school with a racially discriminatory admissions policy even if "a tenet of the religion which it embraces requires that the schools maintain [such] a...policy...."[41] Finally, it should be noted that although the Supreme Court has declined to rule on the precise question of whether religiously motivated racial discrimination may derive some constitutional succor from the Free Exercise Clause,[42] the Court has clearly affirmed the power of the IRS to deny the tax benefit of being classed as a charitable organization to schools which practice racial discrimination.[43]

On November 16, 1977, the IRS issued two private letter rulings[44] concerning scholarship funds restricted in one instance to members of a particular religion[45] and in the other case to male students.[46] The IRS indicated that neither discrimination on the basis of religion nor gender-based discrimination of this sort offended against the federal tax policy and that a donor making a gift with such restrictions could take advantage of the tax benefits provided for charitable donations in the Internal Revenue Code.

D. POLICY RECOMMENDATIONS

We suggest that the Sloan Commission take no action that would have the effect of curtailing the exercise of religious preference in student admissions at the relatively few institutions which actually maintain such a policy. To opt for a strong role of the federal government in eliminating this form of religious preference would set a precedent with the potential for threatening the value of academic freedom in general, and it would needlessly denigrate

the right of religiously affiliated colleges to freedom of association and free exercise of religion guaranteed to them by the First Amendment. Indeed, if such a federal policy were ever to be adopted, the very administration and enforcement of the policy might raise the specter of "excessive entanglement" of the government in the affairs of a religious entity, and the policy might be invalidated on that ground alone.

The Commission need not follow any of the dicta of various Justices of the Supreme Court on this matter, for they offered no persuasive explanation of the views they asserted in an offhanded fashion. Finally, it should be noted that the only ruling issued by the Internal Revenue Service which is analogous to the student admissions issue suggests that the federal tax policy encourages gifts to scholarship funds restricted to members of a particular religion.

For these reasons, we recommend no statutory revision and would only suggest to the Commission that if it wishes to take some action in this area, it might commend the IRS for its action taken in the private letter ruling of November 16, 1977 and suggest that this policy be made public in a revenue ruling or revenue procedure.

CHAPTER FOUR

USE OF PUBLICLY FUNDED FACILITIES

When religiously affiliated colleges and universities receive public funds in the form of grants or loans to construct campus facilities, restrictions inevitably are imposed with respect to the use of these facilities. Legal problems exist with restrictions on use of state[1] as well as federally funded facilities, but for the sake of simplicity and clarity, discussion will be limited to federally funded facilities.

Issues surrounding the use for religious purposes of publicly funded facilities evoke strong emotions in this nation and continue to generate controversy and litigation in areas unrelated to the college campus. For example,the recent Christmas holidays in Chicago gave rise to a federal suit challenging the display of Christmas nativity scenes at City Hall and Water Tower Park as violating the No-Establishment Clause of the First Amendment. Counsel for the city noted that the figures used in the display were given to the city by private donors and had been part of the Christmas celebration in Chicago for more than twenty years.

The federal judge decided that the displays were not prohibited by the Constitution, but he ordered signs to be placed at each display stating that the city did not endorse any religious views represented by the nativity scenes.[2]

A. THE DATA

Surprisingly, the item most often cited in the survey responses as an example of government interference with the religious mission of the institutions was the limitation on the use of facilities constructed at least in part by federal grants or loans.

Responses to the survey instruments disclose that 93 of the responding institutions received more than 200 million dollars in federal funds over the past 15 years under the Higher Education Facilities Act as amended. The average amount received by each institution exceeded $2,160,000. These figures are even more striking when it is understood that survey responses included only a handful of the major church-related universities which tend to receive much larger amounts of these funds on the average than do the small colleges.[3]

Twenty three respondents indicated they had experienced problems in this area.[4] The two major issues were identified as prohibitions on teaching of courses in religion and theology and on conducting religious services in buildings constructed with federal funds.

These issues were raised by small colleges and larger universities across the country which were affiliated with various denominations and religious orders. A major Roman Catholic university in the midwest reported that their "Department of Religious Studies (which does not train or educate for Theological degree) is prohibited from conducting courses in a building partially funded by Federal loans and grants."[5] The assistant to the president at that university indicated in a telephone conversation with the authors that university representatives did not believe that the federal statute was properly interpreted by HEW to prohibit that

use, but the university feared to press the matter with HEW representatives and risk losing the loan.

That complaint was echoed by a Lutheran college in the mid-west,[6] and a small Roman Catholic college in the southwest reported that offices of faculty persons who taught religious studies were required to be moved out of a federally funded building which housed all of the remaining faculty in the humanities department of that college.[7] The president of a small, 2-year United Methodist college in the south wondered why his institution was unable to use a building partially funded with federal funds for "religious instruction" when a neighboring state university uses its publicly funded buildings for that purpose.[8]

Prohibition on the use of dormitory, library, cafeteria, and other spaces for a variety of religious services were reported by several colleges and universities from all regions of the country with various religious affiliations.[9]

B. LEGAL ANALYSIS

The Higher Education Facilities Act of 1963 was passed by Congress to provide a program of grants and loans to institutions of higher education for construction of academic and related facilities. That Act was subsequently amended, but the programs were continued under the new legislation, and the original definition of "academic facilities" was carried through each amendment. It prohibits funding under the Act for "any facility used or to be used for sectarian instruction or as a place for religious worship."[10] In addition, there is a further restriction imposed that "...no facility constructed, reconstructed or renovated with assistance under this subchapter shall ever be used for religious worship or

a sectarian activity or for a school or department of divinity."[11]

The language of these sections seems clear enough, but a multitude of questions have been raised about its application. Is a university permitted to hold annual baccalaureate services in a campus center constructed with federal funds received under this Act? Can meetings of student religious organizations be held in rooms of this campus center, or can offices in the center be used by these student religious organizations? What about the use of publicly funded dormitories by students for informal religious worship? Does it make a difference if a campus chaplain is involved? Can the campus chaplain or staff persons from off-campus religious foundations use those dormitory facilities for individual or group counseling? Can they be used for informal discussion groups if religious or theological topics are included?

Can classroom or other facilities constructed with these funds be used for the teaching of religion in any form? Sacred music? Can these buildings be used as offices of faculty who teach religion, theology or sacred music?

What about religious symbols on buildings constructed with federal funds? Is there any point at which one such symbol or a combination of them violate the terms of the Act?

If fees are not charged to a group engaged in any "religious" activity for the use of publicly funded facilities, does that imply constitutionally questionable financial support to the group? If fees are charged for use of the facilities, must they be charged uniformly to all groups for all uses? Must the fees be set high enough to cover all expenses incurred?

Again, in this area of our study, we find a remarkable lack of clarity in the regulations and case law, which do not offer guidance to

college administrators about these issues. Neither a review of the extensive legislative history nor an examination of the regulations cited under this Act[12] offers any enlightenment. The loan agreement which merely replicates the statutory restriction provides no further guidance.

However, a dearth of reported court decisions does not mean that a particular regulation or law is not causing problems for the institutions being regulated. As we have already seen from the survey responses, difficult conflicts may not reach formal adjudication; the institutions may simply comply as a result of administrative pressure. These are important problems which deserve serious attention even if they were not widespread. However, many colleges and universities are not only attempting to grapple with these questions, but as we shall see, both college administrators and government officials are reaching erroneous conclusions about the mandates of the legislation.

We are aware from personal contacts that some HEW officials are prepared to interpret the restrictions in very expansive terms indeed, some of which range well beyond the wording of the Act. For example, one investigator told officials of a southern college related to the United Methodist Church that the use of a humanities building constructed in part with federal funds for the teaching of sacred music courses and for offices of an instructor who taught courses in religion violated the statute. The official insisted that the Office of Education would call the loan and require the return of grant funds immediately unless the college stopped both of these uses of this building. The college protested that neither the sacred music course nor the courses in religion

were taught in any way from a "sectarian" point of view, but in order to avoid the expenses of litigation (which it should have won handily) the college complied with the orders.

The problems posed by this kind of process are twofold: religiously affiliated colleges are being required to comply with interpretations of the law which are at best questionable, and those standards are being established at the lowest levels of administrative regulation, so they may vary considerably among regional offices of HEW or even within those regions according to the personal whims of the investigator.

1. Judicial Decisions

The United States Supreme Court has provided little guidance in this area, but it is useful to consider the few fragments of the opinions to gather what learning is available to seek direction in these matters.

Eight years after enactment of the Higher Education Facilities Act the United States Supreme Court decided Tilton v. Richardson, discussed above in chapter two. Chief Justice Burger, writing for a plurality of the Court, noted that the district court had made findings that none of the four Catholic colleges involved in that litigation had violated the statutory restrictions and added that "there are no religious symbols or plaques in or on" the buildings constructed in part by the funds made available under that Act.[13] Since that time, it has been assumed by some observers that the statute thus forbids placing religious symbols on buildings constructed with federal funds.

The matter is only casually mentioned in a subsequent opinion of the Supreme Court. In Roemer, Justice Blackmun noted that "some classrooms have religious symbols."[14] And in Smith the Supreme

Court affirmed the judgment of a three-judge panel in which the judges noted in a per curiam opi ion that "[i]n several of the buildings [at Belmont Abbey College] there are crucifixes, crosses and other religious art."[15]

In each instance, the treatment of this issue is almost off-handed, and it is difficult to believe that the Court meant to indicate that the constitution requires a prohibition of the use of religious symbols on these buildings. Furthermore, it does not appear that Congress required such a prohibition, because nowhere in the Act itself nor in its legislative history is there any intimation about the desires of Congress on this matter. In all of these cases, of course, the public funding was sustained, and no further guidance about the use of public facilities was provided by the Court.

In addition, the prevailing opinions of the Supreme Court trilogy which dealt with the issue of public funding to religiously affiliated colleges concentrated attention upon the integrity of the academic enterprise and the atmosphere of academic freedom of the institutions in question, rather than what the Court appeared to regard as the relatively peripheral matters of structural or formal legal control of a college by the affiliated religious body. There simply is no support for the position which would strain the wording of the statute in urging that activities such as the placing of religious symbols on a building or permitting a religiously oriented student group to use a federally funded facility for a meeting place should be seen to violate the Act.[16]

While the Supreme Court touched only tangentially on the issues related to the use of publicly funded property at religiously affiliated colleges, extensive research discloses no other cases which deal with these issues much more directly or which involve

religiously affiliated colleges and the Higher Education Facilities Act as amended. It is necessary, therefore, to attempt to extract helpful legal standards from cases in which the focus is turned elsewhere.

This study will not undertake a review of all cases which might be considered relevant, but rather will select opinions which illuminate key principles discussed by the courts. It is easy to identify genuine and fundamental differences of judicial opinion in these areas, and those very differences underscore the importance of careful consideration of these issues and promulgation of uniform standards by public policy makers.

Only two cases emerge from research which treat the questions at the university level, and in each the issue was the use of facilities at a public university campus for religious purposes.

In Keegan v. University of Delaware[17] the university sought an injunction to enforce a campus regulation which prohibited students and priests from conducting religious worship services in the commons room of a student dormitory, claiming that the Establishment Clause of the First Amendment required the banning of all religious services. The students and priests responded that the enforcement of the ban infringed the Free Exercise Clause of the First Amendment. The court observed that this case was unique and that counsel were unable to supply precise precedents for the issues at stake.

The Delaware Supreme Court ruled unanimously that the university could not prohibit the religious services in this fashion. In reaching that decision the court determined that 1) permitting religious worship in the common room of a campus dormitory would not

violate the Establishment Clause, because to allow religious groups the same use of the facilities as other groups did not advance religion but was rather a lawful accommodation of religion, 2) the university policy imposed a legally recognizable burden on the defendants' constitutional right to free exercise of their religion, 3) the university had not demonstrated the required "compelling state interest" to justify the burden on free exercise.

The court emphasized that this space in question was not a separate religious facility, but a common area provided for general student use. The case was remanded for an evidenciary hearing to determine if the university could show a compelling interest to justify the ban. After an unsuccessful petition for certiorari to the United States Supreme Court, the university chose not to contest the matter further.

In Stacy v. Williams[18] student, faculty and other plaintiffs filed lawsuits attacking the constitutionality of regulations for off-campus speakers imposed by public colleges and universities in Mississippi. The three judge district court reviewed several of the regulations including one which the court construed as preventing student groups from inviting outside speakers on religious topics. The court stated that the university was not compelled to permit outside religious groups to conduct public worship services on campus,[19] but the court found this rule invalid as construed. If it were revised, the court said that it "must specifically be confined to forbidding only religious services conducted on the campus by persons having no connection with the university."[20]

Issues related to the use of public facilities for religious purposes have been raised with far greater frequency at the primary

and secondary levels in the public schools.[21] As discussed earlier in chapter two the United States Supreme Court has distinguished sharply between elementary-secondary and postsecondary education for purposes of determining the constitutionality of public funding, and it may be that ultimately the Court will continue such a distinction in the permitted uses of publicly funded facilities as well. With that understanding, however, we will discuss the following cases without further attention to that distinction unless a factual difference between the two levels seems important.

Vivid illustrations of the key questions examined by the courts in such litigation are provided in two recent cases, Resnick v. East Brunswick Board of Education,[22] decided by the New Jersey Supreme Court in 1978, and Johnson v. Huntington Beach Union High School District,[23] decided by a California appellate court in 1977. Although our discussion is limited to federal constitutional issues in these cases, both courts considered the permissibility of the use of school property in question, under both federal and state constitutions. Both courts were divided. While they are readily distinguishable on their facts, the language of the majority opinion in each case strongly indicates a different judicial attitude about the broader issues involved.

The New Jersey Supreme Court in Resnick decided, by a five to two majority that use of public school facilities for worship by religious groups during noninstructional hours was prohibited by neither state nor federal constitution so long as the use was temporary and the school board's out-of-pocket costs were reimbursed. The court observed that while there is a split among jurisdictions as to whether school premises may be constitutionally

used for religious purposes, the only case in the last 35 years which addressed the federal constitutional issue upheld its use.[24]

The court undertook a careful survey of the tests promulgated by United States Supreme Court decisions in related areas and concluded that where "...essentially no public expense is incurred as a result of a benefit received by religious groups,..." they should not be precluded from receiving the benefit "on the same terms as to other groups of the same class...,"[25] i.e., other nonprofit organizations in this school district. The court concluded that incidental wear and tear on school property was "de minimis" and not a prohibited benefit to the religious group, but they were required to reimburse fully school boards for related out-of-pocket expenses directly attributable to their use, such as extra utility, heating, administrative and janitorial costs.

Because school premises were not used during regular school hours there was no need of supervision to insure that "no religion seeps into secular instruction,"[26] but the court was anxious to stress that the use of the premises must be "temporary" to avoid the risk that lengthy and continuous use would "implicate the Board in the promotion of religion."[27] The court would not impose a strict time limit to define "temporary," but suggested that the leasing of school premises by one of the congregations for more than 5 years "is approaching the outer bounds of reasonable time and nearing the point of prohibited entanglement."[28] The court noted that all of the congregations in question were in the process of securing a permanent place of worship.

It is probably most important to underline what appeared to be a basic reference point for the majority in assessing the

requirements of the First Amendment in these areas as "benevolant neutrality" toward religion, not "hostility or total indifference." To underline this point, the Court cited Chief Justice Burger's opinion in Walz v. Tax Commission:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[29]

In Johnson v. Huntington Beach Union High School District[30] the California appellate court ruled by a two to one majority that permitting a voluntary student Bible study club to meet and conduct its activities on the school campus during the school day was prohibited by the Establishment Clauses of both federal and state constitutions. The resulting prohibition was determined to be a permissible infringement of the students' rights under the Free Exercise Clause.

The court observed that "Preservation of religious liberty and maintenance of governmental neutrality have undergone their severest test in the context of religious exercises within school corridors,"[31] and after a review of United States Supreme Court opinions concluded that to permit such student meetings would have the impermissible "primary effect" of advancing religion by granting a "financial subsidy" resulting from the free use of school facilities such as classrooms, heat and light and by stamping

the school district's "imprimatur upon religious activity."[32] Under school district regulations the club would become an entity "sponsored" by the school which would be entitled to use the school's name in connection with its activities and thus become a part of the school's extracurricular program during the school day (lunch hours) when the students were compelled by law to attend school.

In addition, the court stated that excessive state entanglement would necessarily result from the state statutory requirements that the school supply a faculty advisor who must attend all club functions and approve all club activities, and that the school would have to audit club financial accounts and review membership procedures to insure that they were neither secret nor discriminatory.

All of these cases are illustrative of the enormous range of complex issues connected with the use of publicly funded facilities at religiously affiliated colleges, though none is really in point. It is useful, however, to review in general terms some of the principles enunciated in these opinions for whatever guidance they provide both in predicting the outcome of the litigation which will surely one day arise at a religiously affiliated college and in suggesting policy recommendations in this area.

a. Uniformity of treatment.

Keegan may not be a case directly on point for our purposes, but it is certainly the closest of kin out of all the cases reviewed. The thrust of that opinion was to permit religious groups access to publicly owned facilities on the same basis as they are made available to other similar groups, even if the activities in question included worship services. Resnick strongly echoed the

Keegan court on this point. Uniformity of treatment has emerged as a sound principle of constitutional law and a wise policy choice.[33]

b. Public subsidy of religious activity.

It seems to be generally agreed in these cases that religious organizations and activities should not receive any significant subsidy from public funds. The Resnick majority spelled out very clearly what services must be paid for by the church groups as out of pocket expenses and determined that incidental wear and tear on the school property in question was a permissible "de minimis" benefit to a religious group when other nonprofit groups received the same benefits.[34]

In Keegan there was no discussion of what expenses were involved with the use of the commons room of the dormitory. It seems probable as a factual matter that there were few if any expenses involved. It may be, however, that the Keegan court would simply say that the critical question is uniformity of treatment with other groups, and any "subsidy" which the university provided to other campus groups in terms of utilities or janitorial services would have to be extended as well to religious groups. It is hard to imagine the Johnson majority would agree.

c. "Imprimatur" or government approval

The Johnson majority worried that the Bible study club, under regulations of the school district, would be entitled to use its name and become a part of the extracurricular program of the school in an unacceptable fashion, i.e., became "sponsored" by the school. The dissenting judge disagreed that sponsorship was implied by what he viewed as mere "recognition" of school clubs. These differences in terminology used by the judges

to describe the relationship of school to student clubs may serve to emphasize important differences between higher education institutions and primary and secondary schools which were relied upon by the United States Supreme Court in the trilogy of opinions dealing with public funding of religiously affiliated colleges discussed in chapter two. The assumptions of Chief Justice Burger in Tilton were that church related colleges are attended by more mature students with greater independence of thought that at primary and secondary schools, and the colleges themselves are "characterized by a higher degree of academic freedom and seek to evoke free and critical responses from their students."[35]

At virtually all colleges and universities in this nation, student groups and activities operate with a far greater degree of freedom and autonomy than is characteristic of students at primary and secondary schools. This emphasis on the fundamental importance of the freedom of students to be organized and active in groups and causes with which the university may not agree has been reaffirmed in recent decisions by federal courts and the United States Supreme Court involving public universities.[36] The Supreme Court underlined the place of the campus as "peculiarly" the "marketplace of ideas" and emphasized the importance of access to campus facilities "for meetings and other appropriate purposes" for the constitutionality protected exercise of the freedoms of speech and association by campus organizations.[37]

The federal court in Stacy v. Williams pointed out that if a college or university wishes to do so, it may require that a statement by made at campus meetings and events that the views presented

by speakers or groups do not necessarily represent those of the institution.

This technique has been encouraged by the United States Supreme Court in other contexts. In 1951 the Court first suggested that where there are "reasonable and adequate alternatives" to enforcement of a public policy, the government should avail itself of those alternatives rather than burden the exercise of personal or associational rights protected by the constitution.[38] The "least restrictive alternative" doctrine has subsequently been applied to cases involving First Amendment rights,[39] and it seems wholly applicable to speeches and other gatherings on the campus.

Each of these elements is individually significant: 1) the distinction between institutions of higher education and primary and secondary schools, 2) the fundamental importance of preserving the university as an open "marketplace of ideas," and 3) the ease with which the university can make clear that allowing speeches and other activities or recognizing campus groups does not necessarily imply approval of the message or the purposes thereof. Taken together, these factors render the concern of the Johnson majority about the potential "imprimatur" effect of permitting religious activities inapplicable in the context of a college or university campus.

d. Tension between Free Exercise and Establishment Clauses.

The tension between the opposing thrusts of the Free Exercise and Establishment Clauses has been widely recognized. The United States Supreme Court has called this internal conflict within the First Amendment Religion Clauses a "paradox".[40] While some legal scholars argue that the Free Exercise Clause has risen to a position of supremacy in the event of conflict of the Establishment

Clause,[41] the clash continues to cause uncertainty. For purposes of illustration, we need not undertake a review beyond the cases already discussed in this chapter.

In Keegan the court specifically determined that the Establishment Clause was not violated by permitting the worship services to be held in the dormitory, and that the university's prohibition of those services violated the free exercise rights of the students. The Resnick majority accepted the concept of the dominance of the Free Exercise Clause, but concluded that the question of the propriety of permitting church groups to use school premises was not a free exercise question. It was rather a question of whether permitting the use on a uniform basis with other similar groups ran afoul of the Establishment Clause, and because the government stance was that of "benevolent neutrality," there was no violation. In Johnson, by contrast, the majority detected substantial violations of the Establishment Clause in the use of school premises by the student Bible club, and only a limited and acceptable limitation on the free exercise rights of the students.

As indicated earlier it is not necessarily possible to unravel consistent strands of analysis from these opinions, but as stated in the opinions themselves the analysis must reach beyond "catch phrases" to examine the factual context carefully[42] and then make judgments which must necessarily be matters of degree.[43]

The uncertain patterns of the legal standards may seem surprising but a comprehensive examination of these legal patterns is vital to an appreciation of current problems for administrators of religiously affiliated colleges in deciding what standards apply to use of publicly funded property and in understanding the policy recommendations for change.

C. POLICY RECOMMENDATIONS

A number of policy recommendations emerge from this study including proposed amendments to the governing statute and suggested administrative initiatives.

(1) The Statute

We urge that a distinction be made between grants and loans for purposes of imposing the prohibitions of "religious worship" and "sectarian activity," so that while these prohibitions would continue indefinitely with respect to the grants, they would expire at the time a loan is repaid by the college.

This change seems wholly equitable and consistent with normal commercial loan practices. To put it in different terms, why should the government be permitted to impose restrictions upon the use of these facilities for an unlimited period of time when no other lender could or would attempt to impose such restrictions? The current law seems unfair and unjustified by any discernible policy foundation.

A second statutory change is suggested by the Keegan and Resnick decisions - amend the statute to permit the currently prohibited "religious worship" or "sectarian activity" to be conducted on publicly funded facilities, but only on the same terms and conditions as those extended to other groups. This proposal appears sound both from a legal and policy perspective, i.e., it could be enacted by Congress and supported as a constitutional matter.

(2) Administrative Policy

We strongly urge that HEW adopt new policy guidelines regarding the use of these publicly funded facilities to meet the problems caused by the current lack of standards for such use. These could take the form of additions and amendments to the current regulations, or they could be set forth as administrative guidelines or a policy statement like the proposed policy interpretation recently published by HEW to explain its position on the impact of Title IX on intercollegiate athletics.[44]

As indicated earlier, the promulgation of such guidelines would have a two-fold advantage: a) it would clarify standards to be followed in this area by administrators of religiously affiliated colleges, and b) the existence of uniform standards would reduce arbitrary, erratic and erroneous judgments by regulators who deal with the colleges. As one eminent authority on administrative law stated:"The crucial consideration is not what the statute says but what administrators do."[45]

In promulgating these guidelines HEW administrators should consider the following principles:

1. Religiously affiliated colleges should be subject to no more restrictive standards in use of publicly funded facilities than public institutions or independent institutions which are not religiously affiliated. It simply makes no sense as a matter of policy or constitutional law that standards should vary among religiously affiliated, other independent and public institutions. However, we have gathered the strong impression from survey responses and direct conversations that far more restrictive standards are applied by HEW officials at religiously affiliated colleges.

2. Academic activities which meet the standards of the Supreme Court trilogy for determining the propriety of public funding should not be prohibited under this statute, for example, the teaching of philosophy of religion or sacred music with academic integrity should not be viewed as "sectarian instruction." Neither should there be a prohibition on the use of the facilities in question for offices by faculty who teach these kinds of courses.

The United States Supreme Court has recognized the importance of the study and understanding of religion:

> It might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[46]

Government administrators should not be permitted to impose an unreasonably restrictive definition upon the statutory wording which unduly limits the use of these premises for legitimate and important academic activity.

3. In addition, the use of these facilities for other gatherings or assemblies should not be restricted unless they are indeed "religious worship" or "sectarian activity." For example, meetings of campus religious organizations and counseling sessions with clergy are ordinarily neither worship nor sectarian activity.

4. Finally, and perhaps most importantly, provisions should be formalized which are now apparently only informally used and understood to permit the construction of certain areas within a federally

funded facility which would be paid for with private funding and could then be used for worship or sectarian instruction. Frequently respondents to the survey indicated that they believed they could not use for the prohibited sectarian activities or religious worship any part of a building which was only partially constructed with federal grants and loans. Other administrators of religiously affiliated colleges were able to work out agreements with HEW officials which permit them to use for chapel services or Mass, for example, portions of the building which were built with private funds.

There appears to be clear authority for this process in the statute:

> If...(2) the facility ceases to be used as an academic facility, or the facility is used as a facility excluded from the term "academic facility", unless the Secretary determines that there is good cause for releasing the institution from its obligation, the United States shall be entitled to recover from such applicant (or successor) an amount which bears to the then value of the facility (or so much thereof as constituted an approved project or projects) the same ratio as the amount of such Federal grant or grants bore to the development cost of the facility financed with the aid of such grant or grants. Such value shall be determined by agreement of the parties or by action brought to the United States district court for the district in which such facility is situated. [47]

This section appears to permit the portion of a building funded by college or other private resources to be used for purposes other than those permitted by the statute. In addition, the thrust of this section implies a far greater degree of flexibility in negotiating about these matters than is often exhibited by HEW officials empowered to construe the act in the first instance. These officials often demand summarily an immediate return of grant funds or threaten to call any remaining portions of a loan if a recipient is found not to be complying with the

often strained interpretation of the official about requirements of the act. We encourage the Commission to seek clarification of these procedures and the promulgation of new administrative guidelines so that everyone involved can easily understand rules which are sensible and fair.

CHAPTER FIVE

THE PROTECTION OF THE CIVIL RIGHTS OF HANDICAPPED PERSONS

A. THE DATA

Several administrators of institutions of higher education have stated that they found compliance with administrative regulations enforcing the statutory prohibition against discrimination on the basis of handicap in federally funded or assisted programs[1] to be costly and burdensome. This complaint has been voiced not only by administrators at church related colleges, but by officials at independent and public institutions of higher education as well. One such official is Claire Guthrie, Assistant Counsel of Princeton University. Speaking recently at a conference on legal problems in independent higher education, she charged that it is unfair for the government to impose costly affirmative obligations on hard-pressed private educational institutions without providing financial assistance.[2] She noted that there are no funds currently available for redesigning physical facilities to allow physical access for those whose mobility is impaired. And she added that the position of HEW that colleges can receive help in providing auxiliary aids to blind and deaf students from federally assisted state programs is illusory, for most of these programs are already underfunded and administrators of the programs are unwilling to allocate their scarce resources for this purpose.

This sort of complaint is not a philosophical objection to the federal civil rights statute banning discrimination on the basis of handicap. It is, rather, a call for more generous funding

to carry out the laudable goals of the statute which Congress saw fit to enact. Administrators at many, if not most, colleges have genuine cause to worry about the financial stability of their institutions. It is understandable, then, that this kind of budgetary or fiscal concern should be voiced by these educational leaders, both in the public and private sectors. Approximately 10% of the respondents to the Center survey noted the financial problems created for their institutions by the Act and its accompanying regulations.[3]

In addition, the Center survey disclosed a different sort of complaint about the handicap regulations: one based not on financial worries but on concern for the preservation of the religious integrity of church-related colleges. Sample comments received in our survey focus on the philosophical concern with "too much government," going "against religious tenets,"[4] or "militating against our established moral standards,"[5] or being "contrary to life-style requirements"[6] or "contrary to the Christian principles."[7]

It is important to attend both to the interest asserted by the government in protecting the civil right of reformed alcoholics and drug addicts and to the assertion by administrators at religiously affiliated colleges that governmentally compelled hiring or admission of current users of alcohol or illicit drugs would constitute an unlawful invasion of the colleges' prerogative to enforce a code of morality and discipline in conformity with the religious tenets of their sponsoring religious bodies. Both interests

can be accommodated in a harmonious way. But for this to occur, both parties - college administrators and governmental officials - must approach one another with respect and in a spirit of genuine collaboration.

To make the point that this is not always the case, it should suffice to narrate the efforts of a Southern Baptist-affiliated college to elicit from the Office for Civil Rights (OCR), HEW an interpretation on the lawfulness of its policy concerning the hiring and admission of alcoholics and drug addicts. The history of the protracted negotiations of this college with OCR may be atypical of the government's solicitude for making reasonable accommodations of its interests to the moral tenets of religious groups. But because of the needless delay, expense and frustration experienced by the college in this instance, the story is recited here in some detail.

The first contact of the college with OCR on this matter was the filing on June 12, 1977 of an assurance of compliance with section 504 of the Rehabilitation Act, to which was appended the following note:

> [This] College is not an applicant for or recipient of Federal financial assistance. The College submits this Assurance of Compliance not for the purpose of obtaining such assistance but rather to document its willingness voluntarily to comply with the provisions of Section 504 of the Rehabilitation Act of 1973 and the HEW regulation thereunder. In executing this Assurance, the College does not waive any statutory, constitutional or other legal limitation on HEW jurisdiction.[8]

On August 22, 1977 the president of the college wrote to the Director of OCR, Davis S. Tatel, requesting an official interpretation of the legality of the college's policy to deny admission to current users of alcohol and illicit drugs. On September 8, 1977,

an "Equal Opportunity Specialist" in OCR named Joseph DePhillips sent to the president of the college a copy of a general statement on section 504 issued by Mr. Tatel which concluded:

> Problems occur most often when an institution simply failed to sign the assurance, or to identify the designated employee responsible for assuring continued compliance. In some instances, institutions deleted provisions of the assurance forms or added qualifying statements before signing them. This is unacceptable, since the purpose and the nature of the form is to standardize compliance procedures. And such organizations are now being sent additional forms to sign without deletions or revisions.[9]

On September 30, 1977, acting on the advice of the Washington counsel retained by the college, the president forwarded to OCR a copy of the attorney's letter dated September 8, 1977, which concluded that the college's "admission policy is fully consistent with Section 504 of the Rehabilitation Act of 1973 and the HEW Regulation promulgated thereunder."[10]

Two months after this submissal no response from OCR or any other office within HEW was received by the college. In November, 1977, the president felt compelled to write to his constituency a "dear friend" letter in which he asserted:

> The federal Department of Health, Education and Welfare is closing in on us and we need your prayer help. Both [the college] and our nation need deliverance from the encroaching despotism of a powerful government agency.
>
> H.E.W. is demanding statements of compliance on two documents with the threat that funds now provided to veterans and other students who attend the college will be cut....
>
> The other statement of compliance deals with the law for the handicapped. We have no problem with the law's purpose of equal treatment for the handicapped. In fact, we believe we are already in compliance with the law as Congress enacted it. We have had in our student body those who are blind, crippled, even confined to wheelchairs. But, we cannot comply with H.E.W.'s interpretation that active drug addicts and alcoholics are to be treated the same as physically handicapped persons. A major overriding problem is if we sign the document H.E.W. has sent to us, we are forced to agree with the interpretation of H.E.W. lawyers that this college is a recipient

> of federal funding. We have steadfastly refused to come under the control of a government agency by applying for or accepting any federal subsidy of any kind. We believe that federal grants to American citizens such as veterans in pursuit of the education they have chosen at this college does not constitute federal subsidy of the school. H.E.W. differs on this issue and is demanding that we accept their interpretation. We are working with a major Washington law firm and the Board is carefully considering what stance we should take. Only God, however, can deliver us and this nation from the giant, growing octopus of a federal agency that seems bent on controlling policies on admissions, employment, and the program of every educational institution in the country. If some school does not successfully stand against H.E.W., I foresee the end of private education as we have known it in this nation. Pray for us! I will keep you posted.[11]

This letter illustrates the depths of feeling generated among people with strong religious convictions by unresponsive governmental officials.

No word from HEW was forthcoming until May 25, 1978, when John Wodatch, Chief of the Handicapped Discrimination Branch in the Office of the Secretary, sent to the college president a copy of the thirty-three page document of regulations implementing section 504 as well as a letter calling attention to the following paragraph in Appendix A of the Regulations:

> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use of possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation.[12]

Mr. Wodatch concluded:

> Thus it would not be a violation of Section 504 to require that staff and students abstain from the use of illicit drugs and/or the use of alcohol as a condition to their association with the institution.[13]

Upon receipt of this letter, nearly a year after the original request for a ruling by the agency had been made by the college,

the president submitted an assurance of compliance. The document did not follow the letter of Mr. Tatel's instructions about the unacceptability of altering the government's forms, for wherever the term "recipient" occured an asterisk was inserted, referring the reader to the statement noted above that the college as a matter of policy does not accept federal financial assistance. And the college president attached a copy of Mr. Wodatch's letter, which was incorporated by reference as a condition upon the college's assurance of compliance.

The delay and expense experienced by this college in its effort to obtain a reasonable interpretation of the handicapped regulation should not have been necessary. The Sloan Commission should recommend improvements in this area.

B. LEGAL ANALYSIS

Congress first expressed concern for rehabilitation of the handicapped in a 1920 statute providing training and counselling for disabled veterans of World War I.[14] Congress expanded this program through successive amendments to the law during World War II,[15] after the Korean conflict,[16] and during the war in Southeast Asia.[17] In 1972, however, the Senate and House committees which conducted a review of the program[18] concluded that the existing law was insufficient to meet the needs of the majority of handicapped persons in this country.[19] Both houses of Congress passed major new legislation to meet these needs.[20] President Nixon vetoed this legislation twice as inflationary.[21] After negotiations between congressional sponsors of the bill and administration officials, compromise legislation was enacted and signed into law as the Rehabilitation Act of 1973.[22]

Section 504 of this Act contains a provision closely paralleling the language of Title VI of the 1964 Civil Rights Act[23] and Title IX of the 1972 Education Amendments:[24]

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[25]

Section 504 incorporated by reference the following definition of a handicapped person in the 1973 Act:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and II of this chapter.[26]

This definition seemed to limit the concern of Congress to the employment prospects of persons with handicaps. In 1974, however, after further meetings between congressional sponsors and officials of the Nixon administration, the Act was amended to include the following definition of a handicapped person:

> Any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.[27]

The accompanying Senate Report emphasized that in adopting section 504 the Congress did not intend or at least no longer intended to limit its concerns narrowly to "employment...nor to the individual's potential benefit from vocational rehabilitation services...."[28] It is clear, then, that Congress intends this civil rights provision to apply to federally funded or assisted educational programs.

The text of the statute does not mention alcoholism or drug addiction as a handicap. But there are some indications in the legislative history of the Act which justify the conclusion that Congress intended to include alcoholics and drug addicts within the definition of hancicapped persons.[29]

In communication with Attorney General Griffin Bell, HEW Secretary Joseph Califano raised two objections including alcoholics within the scope of the agency's regulations. Califano's first concern is reflected in the opinion of the Attorney General dated April 12, 1977:

> You state in your request that although Congress has enacted legislation dealing specifically with problems of alcoholism and drug addiction on a number of occasions, you are struck by the fact that there is no mention of alcoholism or drug addiction in the legislative history of the 1974 amendments which adopted the broadened definition of "handicapped individuals."[30]

Attorney General Bell answered this objection as follows:

> We cannot read this silence as evincing an intent to exclude alcoholism and drug addiction from coverage in the face of the legislative history of the 1973 Act which indicates that both conditions were regarded as handicaps that could give rise to eligibility for rehabilitation services under the first sentence of section 7(6). The first sentence of section 7(6) remains unchanged, and presumably alcoholics and drug addicts still satisfy its eligibility requirements. It would be illogical to include such persons under one prong of the now-expanded definition of the term "handicapped individual" but not the other.[31]

Califano's second objection was apparently that to include alcoholics and drug addicts within the definition of handicapped individuals in the 1973 Rehabilitation Act "would result in duplication of the substantial Federal effort on behalf of such persons under the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. §§ 4551 et seq., and the Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. §§ 1101 et seq."[32] Attorney General Bell replied that he was not

convinced by this argument, for - in his words:

> Congress was aware when it enacted the Rehabilitation Act of 1973 that there were other sources of funding for the rehabilitation of alcoholics and drug addicts, and the House Report stated that those other sources of funding should in general be utilized where possible, through cooperative agreements or otherwise. H.R. Rept. No. 93-244, . . . at 10. Thus, Congress recognized the possibility of duplication and proposed a solution for it.[33]

Within weeks after receiving this opinion, Secretary Califano issued the final regulations mentioned above which explicitly include alcoholics and drug addicts within the definition of handicapped individuals,[34] though it might be noted that Califano apparently did so with a twinge of relunctance.[35]

When read together with the accompanying commentary, this regulation does not necessarily lead to the conclusion that there is an unreasonable interference by government with the employment policies or admissions policies of colleges related to a church which professes a moral tenet concerning the consumption of alcohol and the ingestion of illicit drugs. If such a policy were to focus on current users of either alcohol or illicit drugs, as did the policy of the college mentioned above, it should not be regarded by HEW as an invidious discrimination against the handicapped. The section-by-section analysis makes this clear:

> It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be

> taken into account in determining whether he or she is qualified.[36]

It may safely be concluded, then, that a reasonable interpretation of the handicapped regulations do not bar a church-related college, or any other educational institution for that matter, from maintaining an admissions and employment policy which excludes individuals who manifest in their behavior or performance a quality (or lack thereof) which renders them not "qualified"[37] within the meaning of section 504 for admissions to an educational program or for employment within an educational institution which chooses to assert a policy on this matter.

In conclusion, the agency commentary cited by the Chief of the Handicapped Discrimination Branch in his letter to the college president mentioned above provides a short answer which should have been available to the college administrator more swiftly and at less expense. At the conference mentioned above, one of Mr. Wodatch's colleagues was asked about the potential conflict between religious tenets and the handicapped regulation. He should have referred college administrators and college counsel to the portion of the HEW analysis of the regulations which states:

> Employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees....
>
> Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.[38]

Closer questions more difficult to resolve may present themselves in the future interpretation of the handicapped regulations. For example, the section-by-section analysis also includes a passage

fraught with needless ambiguity which might create a genuine conflict with the student and faculty discipline enforced at many religiously affiliated colleges;

> The implications of coverage of alcoholics and drug addicts are two-fold; first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the educational program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.[39]

In the case by case application of the statute and regulations governing discrimination against the handicapped to church related colleges, it is surely desirable that those with enforcement responsibilities will manifest a heightened degree of sensitivity to the religious tenets of institutions they are called upon to regulate. By the same token, it is no less desirable that administrators at church related colleges will, either out of religious conviction[40] or out of "a decent respect to the opinion of mankind,"[41] elect to comply voluntarily with the legitimate goals of the Rehabilitation Act of 1973 and its accompanying regulations.

C. POLICY RECOMMENDATIONS

Three respondents to the Center Survey urged that alcoholism and drug addiction be eliminated from the definition of a handicap in the regulations enforcing section 504 of the Rehabilitation Act.[42] But we do not recommend such a change to the Sloan Commission. Nor do we recommend any change in the language of the statute. But we call attention once again to the forceful presentation by

Assistant Counsel at Princeton, Claire Guthrie, concerning the inadequacy of appropriations to implement the Act. Given the tragic history in this country of humanitarian "reforms" which resulted in perversions of their original intent, largely because of penurious attitudes of legislators subsequent to the launching of the reform,[43] we strongly urge the Sloan Commission to add its voice to those of administrators at colleges, both public and private, who have been calling for federal financial assistance to carry out the purposes of the Rehabilitation Act within these institutions.

Secondly, we recommend that the Commission suggest that the Director of OCR make a serious effort to ensure that religiously affiliated colleges will not experience lengthy and costly delay at the hands of those with enforcement responsibilities in this area, but will experience understanding and will receive help in complying with the policy articulated in the statute and detailed in the regulations without compromising the religious character of the educational institution or its commitment to a religious tenet concerning the use of alcohol or of illicit drugs.

CHAPTER SIX

SPECIAL TAX PROBLEMS

A. THE DATA

None of the respondents to the Center Survey complained directly about the fairness or wisdom of imposing a tax on income derived from business enterprises unrelated to the exempt religious or educational purposes of their institutions. But several of the respondents stated that the duty to file annually detailed financial information was at best "a nuisance"[1] and at worst an "encroachment on the tax-exempt status of church related institutions"[2] and "implied hostility to religion."[3]

Several other institutions voiced the complaint that audits conducted by tax officials purporting to scrutinize the institution's unrelated business income turn out to be fishing expeditions about employment or admission practices which do not fall within the jurisdiction of the IRS. The justification offered by one IRS official for his request to see a wide variety of reports and records unrelated to tax matters was that he just wanted "to see how colleges do things."[4] At a major western university, an IRS official came on campus to conduct an audit on unrelated business income, and asked for all records which might relate to sex discrimination.[5] The president of the institution declined to comply with this request, partly perhaps because the institution was involved in a major struggle with the Department of Health, Education and Welfare over the legitimacy of applying some of the regulations enforcing Title IX to religiously affiliated colleges.

A Catholic university in Pennsylvania stated that an IRS official announced that the purpose of a campus visit would be to conduct an audit of the university's unrelated business income, but focused instead on minority hiring and student enrollment.[6] A Baptist college in the midwest reported that an IRS official visited the campus ostensibly to discuss employment practices scrutinized under provisions related to the college's tax exempt status. Once he was on campus, it became apparent that his primary reason for visiting the college was to conduct a thorough investigation of the practice of tuition remission benefits for faculty members.[7]

These four instances of contacts between colleges and tax officials may be unrepresentative of the behavior of IRS generally. But it should be noted that the examples are drawn from different sections of the country and from institutions related to different religious bodies. Two of the examples suggest that tax officials are requesting information without any apparent need to know that information and without any clear statutory authority for seeking it. The other two examples involve matters appropriate for inquiry by an IRS official. But unless there is an expectation of discovering more information from college administrators by surprising them about the focus of inquiry, it is not clear why a governmental official should announce one purpose for a visit to a campus and then focus on a wholly unrelated matter.

B. LEGAL ANALYSIS

Religiously affiliated colleges encounter three special problems in the administration and enforcement of the federal tax

policy: the definition of business income as related or unrelated to the tax-exempt purposes of the institution, the definition of an integrated auxiliary of a church for purposes of filing requirements, and the expansion of federal jurisdiction over faculty employment and student admission matters by tax officials. The first two issues raise the question of whether it is legitimate for the government to attempt to define religion. And the third issue raises the question of whether a harmonious relationship between government and campus is possible in the face of hardened attitudes of mutual suspicion or hostility. Before an answer to these questions can be ventured, the history of the intent of Congress and the execution of the federal tax policy by the IRS must first be explored.

(1) TAX ON UNRELATED BUSINESS INCOME

Section 501(c) of the Internal Revenue Code exempts from taxation "[c]orporations...organized and operated exclusively for religious...or educational purposes...."[8] Section 501(b), however, makes clear that this exemption applies only to the business income which is related to the charitable organization's exempt purposes. Section 511 imposes a tax on the "unrelated business taxable income" of these institutions. Section 512 defines such taxable income. Section 513 sets forth a general rule defining unrelated trade or business as:

> any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption....

And section 514 makes provisions for the taxability of debt-financed income and property.

Readers of the New Yorker[9] were recently reminded that one of the catalysts for the imposition of the unrelated business tax on otherwise exempt institutions was the acquisition of the income of the Mueller Spaghetti Company by the New York University Law School.[10] Fr. Charles Whelan, professor of law at Fordham recently noted three other reasons which motivated Congress to impose the tax in 1950:[11]

> (1) To stop businessmen from constructing commercial empires by adroitly manipulating charitable trusts and tax-exempt organizations;[12]
>
> (2) To prevent unfair competition by tax-exempt organizations with taxpaying commercial businesses;[13] and
>
> (3) To put an end to most of the disputes over continuation of the exempt status of a tax-exempt organization that acquired and operated a commercial business.[14]

Administrators of religiously affiliated colleges should not, therefore, exaggerate their difficulties with this provision of the Tax Code, as though Congress had singled them out is a hostile manner. To the contrary, it should be remembered that two major representatives of Christian churches in this country, the National Council of Churches and the United States Catholic Conference, recognized the justice and equity of applying this tax to churches and in a rare if not unprecedented moment of tax history went before the appropriate committees of the Congress in 1969 and asked that this tax be imposed on them.[15] In short, the background of the unrelated business income tax is to be sought in the complexity of contemporary financing and business rather than in a congressional conspiracy against the churches and their schools. For church related schools stand in the same relation to this tax as do other schools and tax-exempt institutions.[16]

Like many aspects of tax law, the unrelated business income tax is by no means simple or uncomplicated.[17] For purposes of this discussion, however, three categories will be employed: (1) types of business activities which are clearly unrelated to the educational or religious purposes of an exempt institution, (2) business ventures which are clearly related to those purposes, and (3) business activities which combine aspects of relatedness and unrelatedness. A review of relevant tax decisions and rulings may facilitate the understanding of these three categories.

First, there are some kinds of business which the government will regard as clearly unrelated to an exempt purpose. An early illustration of this category is De La Salle Institute v. United States.[18] In this case the Christian Brothers in California were unsuccessful in their attempt to recover back taxes paid on the income derived from their winery. Relying in part on the legislative history of the Revenue Act of 1950, which explicitly mentioned the winery in question,[19] the district court ruled that the winery income was unrelated to the educational functions of the California corporation and was therefore liable to federal income tax, even though the society used the revenues from the winery to maintain its schools and religious chapels.

More recently, in Iowa State University of Science and Technology v. United States,[20] the Court of Claims upheld the government's position that the University was required to pay the unrelated business income tax on the revenues derived from its operation of an ABC-affiliated television station. Similarly, the national office of IRS issued a technical advice memorandum to one of its district directors ruling that a state college would have

to pay tax on the income derived from the sale of memberships to the general public to use its golf course and on the income derived from leasing facilities to a professional football team for its summer training camp.[21]

Another example of unrelated business income was provided by the national office of IRS which on June 21, 1978 issued private letter rulings to eleven Cistercian (Trappist) monasteries.[22] In these rulings the IRS held that the external sale of such items as bread, jams, agricultural products, and concrete blocks was not related to the exempt function of the monasteries. Despite a centuries old tradition within the monastic community that "to work is to pray," and despite the fact that the monks are not directly compensated for their work, the IRS was unwilling to endorse an interpretation of the tax law so broad as to include nonreligious communes eager to avoid federal income tax.[23] It, therefore, ruled narrowly on the unrelated business income tax issue, but allowed an offsetting deduction for the maintenance of the monks, similarly confined narrowly to traditional monastic communities.[24]

Secondly, there are commercial enterprises engaged in by tax-exempt institutions which the government regards as clearly related to the institution's tax-exempt purposes. The private letter rulings issued to the Cistercians, for example, list the manufacture and sale of altar breads, vestments and religious art as related non-taxable business.[25] By the same token, one might assume that the Christian Brothers or another society engaged in the wine business could legitimately claim that the production and sale of sacramental wine for use in liturgical functions are related to a tax-exempt purpose.[26]

Although the Iowa State case cited above means that a college cannot claim that the operation of a commercial television station is tax-exempt, a college may clearly run an athletic program as part of its educational venture.[27] And a college does not have to pay income tax on any profits which it might make on such athletic programs, including the revenues derived from television broadcasts of collegiate football games.[28]

The technical advice memorandum cited above provides another example of a related business engaged in by a state college. For while regarding the leasing of facilities to a professional football team as unrelated, the national office of IRS ruled that income derived from the operation of a repertory theater was tax-exempt.[29]

Thirdly, there are cases which present more difficult questions of interpretation as to whether a commercial venture is related or unrelated to an exempt function. In 1974 the IRS issued a ruling which exempted the revenue derived from the operation of a snack bar in a museum on the grounds that the presence of the food service in the museum allowed the visitors to spend more time in the museum.[30] But in the technical advice memorandum cited above, the national office of IRS decided that income derived from a dining facility at a state college to serve the patrons of its repertory theater program was unrelated business income subject to taxation. The memorandum distinguished the prior revenue ruling, stating that the theater program "contributes importantly to the exercise and performance of exempt educational and cultural functions of the organization," whereas pre-theater dining "may enhance the theater patron's evening," but "does not contribute importantly to the organization's exempt function."[31]

A final hypothetical may serve to illustrate the need for careful thought about the character of commercial enterprises engaged in by educational institutions. A college may clearly assert that the operation of a bookstore is a necessary component of its educational endeavor. But this principle by itself would not suffice to avert the eye of a governmental official whose attention was called, perhaps by jealous local merchants, to the operation of a campus bookstore where a major portion of the sales is made up of plastic paraphernalia or of furniture and appliances which are clearly non academic in nature.

(2) INTEGRATED AUXILIARY OF A CHURCH

Even if an exempt organization has no unrelated business income tax to report (Form 990-T), it may be subject to filing requirements imposed generally on such organizations (Form 990). These filing requirements can be stated more succinctly than the definition of relatedness or unrelatedness of a trade or business engaged in by an otherwise exempt institution. Section 6033(a)(1) of the Internal Revenue Code imposes generally on exempt organizations a requirement to file an annual return:

> stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary or his delegate may by forms or regulations prescribe, and [to] keep such records, render under oath such statements, make such other returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe;...

Section 6033(a)(2) provides that the IRS may not apply this rule to "churches, their integrated auxiliaries, and conventions or associations of churches...or the exclusively religious activities of any religious order."

Prior to the amendments contained in the Tax Reform Act of 1969, section 6033(a) read in pertinent part as follows:

> No such annual return need be filed under this subsection by any organization exempt from taxation under the provisions of section 501(a)-
> (1) which is a religious organization described in section 501(c)(3); or
> (2) which is an educational organization described in section 501(c)(3), if such organization normally maintains a regular faculty and curriculum and normally has a regularly organized body of pupils or students in attendance at the place where its educational activities are regularly carried on; or...
> (4) which is an organization described in section 501(c)(3), if such organization is operated, supervised, or controlled by or in connection with a religious organization described in paragraph (1)....32

The pre-1969 law, then, exempted all religious organizations, including church related colleges, from the duty to file an annual financial report to the IRS. But, over the protests of the NCC and the USCC, Congress repealed this blanket exemption for religious organizations and substituted a more limited exemption for churches and their "integrated auxiliaries." The question for a church related college, then, is whether it can avoid the annual filing of a detailed financial form (Form 990) on the grounds that it is an integrated auxiliary of a church.

The Conference Committee Report accompanying the 1969 Act explicitly mentioned a church's religious schools among the integrated auxiliary organizations of a church exempted from the reporting requirements of section 6033:

> The House bill provided that every exempt organization, whether or not a private foundation, must file an annual information return unless the Treasury Department determines that this is unnecessary for efficient tax administration....

> The committee provided two exceptions to this provision. First, it exempted churches, their integrated auxiliary organizations, and conventions and associations of churches from the requirement of filing this annual information return.
>
> Among the auxiliary organizations to which this exemption applies are the mission societies and the church's religious schools, youth groups, and men's and women's organizations, and inter-church organizations of local units qualifying as local auxiliaries.[33]

There is some basis in the legislative history of the statute, then, for a religiously affiliated college to assert that it is an integrated auxiliary, but in so doing it must assert that it is a "religious school." As was stated in chapter two with reference to religious preference in employment practices, religiously affiliated schools have been placed by Congress, perhaps inadvertently, on the horns of a dilemma: to avail themselves of a tax benefit, they must describe themselves in language which makes them vulnerable to a challenge of their eligibility for public assistance.

If the action of Congress has created difficulties for church related colleges, the administrative decisions of the IRS have complicated matters still further. On December 29, 1976, the IRS issued a regulation attempting to clarify the term "integrated auxiliary."[34] In order to be classified as an integrated auxiliary of a church, an organization must meet three criteria. First, it must be exempt from taxation as an organization described in 501(c)(3). Second, it must be "affiliated" with a church. The Service defined the term "affiliated" as follows:

> ...the term "affiliated" means either controlled by or associated with a church or with a convention or association of churches. For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph. An organization is associated with a church or with a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.[35]

Third, its principal activity must be "exclusively religious":

> An organization's principal activity will not be considered to be exclusively religious if that activity is educational, literary, charitable, or of another nature (other than religious) that would serve as a basis for exemption under section 501(c)(3).36

The regulation also stated that "organizations which are integrated auxiliaries include a men's or women's organization, a religious school (such as a seminary), a mission society, or a youth group."[37]

In 1977 the IRS stated that a church affiliated college, exempt from tax under section 501(c)(3) of the Code, that trains ministers and lay workers to serve religious functions in the church is an integrated auxiliary of a church for the purposes of section 6033.[38] The organization was founded by the church to provide an authorized training center for Christian workers and prospective ministers, and it offered three training programs. One trained teachers for the church's Sunday School. The second was a two-year program in religious study for persons holding an advanced teacher's certificate. The third program trained ministers, Christian workers, and missionaries and provided them with a religious and general educational background for church work. The Service stated that "although each course of study includes secular as well as religious subjects, the principal emphasis in each course of study is on religious subjects." The author of the memorandum added:

> The described organization's principal activity and the basis for its exemption is preparing ministers and laymen to serve religious functions in the church. Training individuals for church service is a religious activity characteristic of a religious school as that term is used in section 1.6033-2(g)(5)(iv) of the regulations.
>
> Since the principal activity of the organization is exclusively religious and because it is exempt from Federal income tax under section 501(c)(3) of the Code and affiliated (within the meaning of section 1.6033-2(g)(5)(iii) of the regulations)with a church, it is an integrated auxiliary of a church within the meaning of section 1.6033-2(g)(5)(i) of the regulations.

> Accordingly, the organization is not required by section 6033 of the Code to file an annual return on Form 990.[39]

The regulations also give examples of organizations which are not integrated auxiliaries and are therefore required to file an informational return. An affiliated hospital is not an integrated auxiliary because its principal activity could be the basis for a 501(c)(3) exemption independent of its religious affiliation. An orphanage which is an independent entity, but is affiliated with a church must file Form 990 for the same reason. The same is true of an old age home which is affiliated with a church. With respect to affiliated universities, the following example was included:

> (University E) provides a program of general academic studies on the undergraduate level and graduate education in the arts, humanities, and sciences. Although it offers courses in religion, it does not provide religious training in the sense that a seminary offers such training. The principal activity of the university is to provide college and graduate level education of a general academic nature. Since this activity could serve as the basis for University E's exemption under section 501(c)(3) if it were not affiliated with a church, E is not an integrated auxiliary of a church within the meaning of paragraph (g)(5) of this section. In addition, because E is a college level institution, paragraph (g)(1)(vii) of this section does not apply and E is required to file a return under section 6033.[40]

In short, the IRS has created an interpretation of the phrases "integrated auxiliaries" and "exclusively religious activities" which is very narrowly confined to functions such as preaching, worship, and the formation of clergymen. In so doing, it may or may not be correct in its claim to be carrying out the will of Congress, for the legislative history on the matter is - as is often the case - scant and not illuminative. It should also be noted that the NCC and the USCC, which as mentioned earlier favored the application of the unrelated business income tax to churches, both opposed the change in the reporting requirements enacted by Congress

in 1969.[41] Church groups also have unanimously denounced the IRS for adopting its restrictive definition of the concept of religion.[42] In any event, under the existing interpretation of section 6033, the critical question facing a church related college or university seeking to be treated as an integrated auxiliary of a church is whether its principal activity is "exclusively religious." Only if that is the case, may such a college avoid the filing requirements imposed on exempt organizations in section 6033(a)(1) of the Internal Revenue Code.

Three things might be noted in conclusion. First, the number of institutions of higher education succeeding in demonstrating the exclusively religious character of their enterprise to the IRS would probably be minimal. Second, in gaining the exemption from the informational filing requirement, such an institution would expose itself to a challenge of its eligibility for public institutional assistance and might even endanger the permissibility of public aid to students attending the institution. Finally, on the basis of sound business policy and for other prudential reasons, church related colleges ought not in any event neglect to maintain the sort of financial records necessary to fulfill the requirements of section 6033 of the tax code, even if this provision does not formally apply to these institutions.

(3) TAX-EXEMPT STATUS AND RACIAL DISCRIMINATION

As was stated above in chapters two and three, both the courts and the IRS have determined that a school which maintains a policy of racial discrimination, either in faculty and staff hiring or in student admissions, is subject to loss of its tax-exempt status. As was noted above in the first part of this chapter, none of the respondents to the Center survey voiced any complaint either about

the wisdom and fairness of this general policy, or about the specific requirements imposed on educational institutions by Rev. Proc. 75-50. Some of the survey respondents,[43] however, appear to be concerned about another IRS ruling which states that racial discrimination is impermissible even if based on religious tenets.[44] Finally, the recent issuance by the IRS of a proposed revenue procedure on tax-exempt private schools,[45] manifests a serious lack of sensitivity on the part of government officials to the nature of religious schools. Each of these three issues merits brief discussion.

The first issue is the general policy denying tax benefits to schools which discriminate on the basis of race. As was discussed above in chapters two and three, this policy enjoys the support not only of Justice White's single concurrence in Tilton,[46] but also of the full Court in Coit v. Green[47] and Norwood v. Harrison.[48] In the light of this authority, it seems clear that the IRS could adopt no other general policy but to deny tax-exempt status to racially discriminatory schools. It did so in a 1971 revenue ruling,[49] which was expanded upon in a 1972 revenue procedure.[50]

It likewise seems clear that the Commissioner of Internal Revenue was well within the bounds of reasonable discretion in the administration of the federal tax policy when he promulgated more specific guidelines for private tax exempt schools in 1975.[51] In revenue procedure 75-50, the Commissioner insisted that in order to retain tax-exempt status, a school must file an annual certification (Form 5578) to the effect that it has a racially nondiscriminatory policy, contained not only in a general resolution of the governing board but also in information about the school made available to the outside community, either in the form of brochures or advertisements. In 1975 the IRS was careful to acknowledge that a religiously

affiliated school may prefer students of the sponsoring religious group, even though there may be few or no members of a racial minority in the sponsoring church:

> A school that selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis.[52]

In the same year the IRS issued a ruling which stated that in a proceeding to terminate tax exempt status a school could not lay claim to a religious tenet as a defense to an allegation of racial discrimination.[53] In 1976 the Supreme Court ruled in Runyon v. McCrary[54] that racial discrimination by a private school was impermissible under one of the Reconstruction era civil rights statutes,[55] but it noted that it was not presented with the question whether religiously motivated racial discrimination may derive constitutional succor from the Free Exercise Clause. In 1978 the Court declined to review a decision of the Fifth Circuit involving the question left open in Runyon.[57] Thus the IRS as yet lacks definitive support from the Court in this construction of the federal tax policy, but in the opinion of the authors of this study, the IRS position is correct both legally and morally.

On August 22, 1978, the IRS published a proposed revenue procedure relating to the racially discriminatory policies and practices of exempt private schools.[58] This proposal has elicited sharply critical comments among members of the Congress, religious educators, church leaders, and members of the public sympathetic to private education.[59] Most of those comments do not assail the obligation imposed on the Service to terminate the exempt status of a school adjudicated to be racially discriminatory.[60] They focus instead on the Service's assumption that a school is "reviewable"

if it has "an insignificant number of minority students,"[61] or can demonstrate compliance with at least four of the five criteria listed by the Service as "factors [giving] evidence [of] operation in good faith on a nondiscriminatory basis.[63] The gist of the criticism is threefold. First, the presumption of racially discriminatory intent by "reviewable schools" is an unwarranted burden for schools which have been adhering consistently to the requirements of Revenue Procedure 75-50 and of its 1972 predecessor. Secondly, the presumption is discriminatory in that the IRS cannot affect public school districts but can subject private schools to costly administrative proceedings. Thirdly, the factors chosen by the Service as criteria for demonstrating a nondiscriminatory policy include misleading and inaccurate tests, such as comparison of the racial composition of an entire public school district with that of a local subcommunity forming the territory from which parochial school children are normally drawn.

As the last comment suggests, the primary focus of this proposed revenue procedure is on elementary and secondary schools.[63] But comment on this IRS proposal has been included in this study because the Service explicitly left open the applicability of the procedure to "cases...where a private college or university is adjudicated to be discriminatory."[64] Such institutions may take scant comfort that they appear to be favored over elementary and secondary schools by being subjected to IRS review only after an adjudication of allegations of racial discrimination. Institutions of higher education are swept up with all other schools in the declaration that:

> If there is any evidence that a school in fact has a racially discrimatory policy or practice the Service may find that the school is not entitled to exemption..., without regard to whether the school has complied with the guidelines set forth in this revenue procedure.[65]

C. POLICY RECOMMENDATIONS

(1) THE IRS AND THE DEFINITION OF "CHURCH" AND "RELIGION"

The first conclusion which we draw from the recently issued private letter to the Trappist monasteries concerning their unrelated business income, and from the recently proposed revenue procedure on private tax-exempt schools is that it would be naive for administrators at religiously affiliated colleges to expect administrators of the federal tax policy to adopt a hands-off approach to religious entities. Given the relative ease of perpetrating hoaxes and frauds under the name or guise of religion,[66] the government has a legitimate interest in defining religion. Although serious scholars appear to urge church groups to resist this attempt by the government to define the meaning of religion,[67] it is our judgment that these groups would thereby abandon an important process at their own peril.[68]

Accordingly, we recommend that church related colleges recognize the legitimacy of this governmental interest and participate actively, indeed vigorously whenever necessary, in the task of identifying those aspects of their enterprise which are genuinely religious in character and thereby entitled to special consideration for tax purposes. By the same token, we recommend that the Sloan Commission urge the Commissioner of Internal Revenue to foster greater sensitivity within the IRS to the legitimate interests of religious groups[69] engaged in the educational enterprise than is manifest in the

revenue procedure concerning the tax-exempt status of private schools which are allegedly racially discriminatory. In brief, governmental officials and educators should approach one another on difficult tax matters not with suspicion and hostility, but with the virtues necessary for any meaningful dialogue: respect for the other party, and frankness and candor in deliberations.

(2) ADMINISTRATIVE PRACTICE OF THE IRS

Our second recommendation flows both from the data of our survey and from the text of the recently proposed revenue procedure on private tax-exempt schools. Our survey discloses that administrators at religiously affiliated colleges resent the attempt by IRS officials to expand their jurisdiction into matters of academic policy, such as student admissions and faculty hiring, which are either better left for the academy to decide on its own, or which more appropriately fall within the jurisdiction of other federal agencies such as the Office for Civil Rights, HEW, and the Office for Federal Contract Compliance Programs, Department of Labor. The language of the above mentioned revenue procedure appears to favor this expansion of IRS jurisdiction into the field of civil rights enforcement. As a matter of governmental efficiency alone, such expansion appears to the authors of this study to be wasteful duplication of other governmental efforts and to be inconsistent with the announced goals of President Carter to consolidate overlapping federal agencies.[70] The primitive attempt by IRS to define the existence of a civil rights violation, as contained in the above mentioned proposed revenue procedures, suggests that IRS is not the appropriate body to identify such violations in the first instance. We, therefore, recommend that the IRS rely instead on agencies with

longer experience in this field and with expertise for fact-finding, such as the courts or the Office for Civil Rights, HEW.

(3) STATUTORY REVISION

As we stated at the beginning of this chapter, none of the respondents to the Center Survey expressed a desire to remove from church related college the tax imposed by Congress in 1969 on their unrelated business income. We are of the opinion that this tax is equitable and perhaps constitutionally required. We, therefore, recommend no change in this provision of the Internal Revenue Code.

On the other hand, we see no reason why the IRS or any administrative agency should be saddled with the task of giving meaning to vague, ill-considered legal phrases such as "integrated auxiliary" of a church, or "exclusively religious activities." The tax officials have labored valiantly to give meaning to these phrases[71] ever since Congress invented the phrases out of whole cloth[72] and hastily inserted them into section 6033 of the tax code in 1969. The Service has been the target of severe criticism for because of the guidelines it has issued on this provision.[73] In our opinion, much of this criticism would have been deflected to its proper target, the Congress, if the IRS had reported, annually if necessary, to the appropriate committees of the Congress, that these phrases were unworkable and that new language would have to be crafted. We do not recommend that the Sloan Commission advocate that all exempt institutions be required to file annually the detailed financial informational returns required by section 6033 of the tax code. But we do recommend that the Commission urge the Congress to speak its mind plainly on this issue. If Congress truly wants all educational organizations in the country, including all colleges

of any of a wide variety of relationships to religious bodies, to file Form 990 with the IRS, a bill should be introduced to accomplish that result in religiously neutral language.[74] As Fr. Whelan has wisely observed, "The discussion would then focus, as it should, on the desirability of such a law and not on whether certain [educational] activities are 'religious' or 'extremely religious.'"[75]

CHAPTER SEVEN

SPECIAL LABOR LAW PROBLEMS

A. THE DATA

One of the respondents to the Center survey indicated that the jurisdiction of the National Labor Relations Board (NLRB) over church related colleges constitutes a diminution of the religious character of these institutions. This respondent, the president of a Lutheran university, wrote: "[The] potential of unionization reduces opportunity of the university to emphasize religious 'calling' and sense of Christian community."[1] This viewpoint was expressed by only one respondent (.5%) and cannot be regarded as a predominant view within the group surveyed. Other religious leaders clearly reflect a different sense of the potential for realizing their religious vocation in and through the trade union movement.[2]

Another respondent, president of a small Roman Catholic college, wrote that in 1973 the NLRB excluded members of a religious community from participating in an election to determine whether the faculty should be represented by a labor union in collective bargaining.[3] The college did not appeal the decision of the board; and in the election which ensued the lay members of the faculty overwhelmingly rejected unionization. This decision of this faculty does not reflect a national trend, for in recent elections involving Roman Catholic institutions of higher education, 9 colleges have opted for a union and 7 have resulted in decisions not to form a union.[4]

A third area of labor law included in the Center survey is the impact of the Occupational Safety and Health Act (OSHA).[5] Two

respondents noted that the cost of complying with this Act and the voluminous regulations issued under the authority of the Act has the effect of pushing tuition costs higher. One respondent asserted that this creates a greater imbalance with neighboring colleges in the public sector,[6] while the other acknowledged that the problem was a financial rather than a religious one.[7] A third respondent stated that prior to the recent decision of the Supreme Court in Marshall v. Barlow's, Inc.,[8] there were problems with OSHA inspectors coming on campus without prior notice.[9] The fourth respondent who identified a problem with OSHA was the president of a Lutheran university who noted that an OSHA administrator had required the institution to introduce structural modifications of dubious value, let alone necessity for safety, in the university chapel.[10] Because this constitutes the only instance in which one of the respondents to the Center Survey indicated that a decision by OSHA involved governmental overreach into religious matters, we conclude that the administration of this Act creates no special difficulties unique to religiously affiliated colleges.

The other two labor law problems identified in the Center survey, however, both raise significant legal questions for administrators of religiously affiliated colleges. These questions merit serious reflection, but it is still premature for us to recommend a policy change with respect to the jurisdiction of the NLRB over religiously affiliated colleges and to the placement of religious faculty members in collective bargaining units.

B. LEGAL ANALYSIS

(1) NLRB JURISDICTION

In 1951 the NLRB declined to exercise its jurisdiction in a case involving Columbia University; in this decision the Board announced

that it would not exercise jurisdiction over any private institution of higher education.[11] This rule prevailed until 1970, when the Board overruled the 1951 decision and stated that "we will no longer decline to assert jurisdiction over [private colleges and universities] as a class," on the theory that "jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce in order to insure the orderly, effective and uniform application of the national labor policy."[12]

Although the Board has asserted its statutory jurisdiction over private colleges generally, three questions remain open in determining whether a particular college might be beyond the scope of the NLRA. First, if a particular college does not have an annual budget in excess of $1 million, it does not come within the Board's definition of its discretionary jurisdiction. Secondly, in a few colleges faculty members have become so involved in the administration of the institution that a reviewing court may not regard them as "employees" within the meaning of the Act. And thirdly, a religiously affiliated college which is pervasively sectarian in character may be able to resist the jurisdiction of the NLRB on the grounds that this exercise of governmental power would contravene the religion clauses of the First Amendment.

The first question is a simple and straightforward factual determination. If a private nonprofit college or university has an annual budget in excess of $1 million,[13] it is presumed to be "affecting commerce"[14] and thereby to fall within the Board's jurisdiction. If its annual budget is less than $1 million, the

presumption is against the Board's jurisdiction on a de minimis view of the institution's impact on commerce among the several states.

Although it is hardly likely that the Board would assert its jurisdiction in the case of an institution which does less than a million dollars' worth of business annually, it has, on occasion, asserted its statutory jurisdiction, irrespective of whether any of its discretionary jurisdictional standards have been met.[15] Neither exceptional cases of this sort nor the Board's declination to assert its jurisdiction over industries which are essentially local in character[16] have ever persuaded serious scholars or appellate tribunals to accept a generalized argument that the Board's jurisdiction is assailable on Commerce Clause grounds. But an analogous argument was successfully mounted in a recent challenge to a provision of the antitrust law, which is likewise grounded in the Commerce Clause.[17] It is conceivable, then, that an aggrieved employee seeking the protection of the NLRA might fashion a novel argument claiming that the Board should assert its jurisdiction over a particular college which has a significant impact on commerce among the several states, even though its annual budget is under $1 million. Conversely, a college seeking to avoid the Board's impact might argue that despite the fact that it does more than a million dollars' worth of business annually, it is wholly local in character and beyond the reach of the Commerce Clause. In the judgment of the authors of this study, however, neither of these contentions are likely to prevail.

Secondly, some colleges have sought to avoid NLRB jurisdiction by asserting that their faculty members cannot be regarded as "employees," but are really supervisors or managers because of the extensive role they play in campus decision-making. In a 1975

decision involving Wentworth Institute and the Wentworth College of Technology in Boston,[18] both the Board and the First Circuit Court of Appeals rejected this contention. Examining the legislative history of the NLRA, the court ruled that the Board was granted jurisdiction over nonprofit higher educational institutions.[19] Even though a case can be made for reaching this result through administrative rule making,[20] Judge Campbell wrote in Wentworth Institute that it was within the Board's "informed discretion"[21] to approach the issue of jurisdiction over nonprofit educational institutions through case-by-case adjudication. Under the particular facts before it,[23] the Wentworth court decided that the faculty members of that college were "employees" rather than supervisors or managers; it, therefore, granted enforcement to an order of the Board directing the college to bargain with the certified union representatives of its full-time faculty.[24]

Most recently the Second Circuit denied enforcement of a similar Board order directing Yeshiva University in New York to bargain with the union representing a unit of its full-time faculty. In an opinion written by Judge William Mulligan, former Dean of Fordham Law School, the Second Circuit ruled that the full-time faculty members at Yeshiva were not merely "employees" but acted in a supervisory or managerial capacity as well, and were on that basis to be excluded from collective bargaining with the university.[25] As did Judge Campbell in the Wentworth case, Judge Mulligan in Yeshiva carefully limited his decision to the facts before the Court, acknowledging that in future cases it might approve of collective bargaining for faculty members where the record would not indicate that faculty members have a major role in the institution's decision-making.[26]

The Board is, of course, bound to acknowledge that a reviewing court's judgment decides the particular case before it and that other panels within the same circuit would likely defer to the Yeshiva panel, if only as a matter of stare decisis. But the Board is not bound to apply the reasoning or the principles announced by Judge Mulligan in Yeshiva to future cases of a similar nature. Perhaps because of the prestigious character of the Second Circuit or simply because there are so many private colleges located within New York and Connecticut, the area controlled by that circuit, the NLRB has supported the union's petition for review of the Yeshiva decision by the Supreme Court.[27] The Court has not yet acted on this case.[28] But even if it were to grant plenary review on the merits, it is unlikely that a majority of the Court will rule as a matter of law, if not as a matter of fact, that full-time faculty members at private colleges are so involved in the governance and administration of these institutions as to be supervisors or managers rather than employees. For to do so would not only affirm the particular result reached in Yeshiva, but would go beyond the conclusion of both the First and the Second Circuits that this issue must be decided on a case by case basis. But prediction of future behavior is always risky, and if the Court decides that Yeshiva states not merely the rule of the case but the law of the land - perhaps on its own reading of the legislative history concerning the jurisdiction of the NLRB over nonprofit institutions[29] - then religiously affiliated colleges as a subunit within the broader world of nonprofit educational institutions will be exempt from the Board's jurisdiction.

Even if the Court does not reach this result in Yeshiva - and we think it likely that it will not - a third argument concerning the Board's jurisdiction would still remain a live issue for religiously affiliated colleges: does the exercise of such jurisdiction over lay teachers at these institutions contravene either the No-Establishment Clause or the Free Exercise of Religion Clause of the First Amendment? This issue has been squarely joined in the context of church related secondary schools, for the Supreme Court has already heard oral arguments this term in NLRB v. Catholic Bishop of Chicago.[30]

The Board has declined to assert its jurisdiction over schools which are exclusively religious in character,[31] but has asserted jurisdiction over schools which combine religious and secular educational functions.[32] Judge Pell wrote in his opinion for the Seventh Circuit that "simply because a school includes in its curriculum secular subjects it is [not] thereby deprived of the protection of the Religion Clauses in its recognized pursuit of the propagation of its religious faith."[33] He stated further that whenever the imposition of an order to bargain "conflicts with the Religion Clauses...the First Amendment protective wall should prevail.... [A]n even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools should not now be any less effective to ward off the inhibiting effect of the governmental regulation here involved."[34]

Irrespective of whether the Board or the Seventh Circuit is affirmed by the Supreme Court, the Court's decision in Catholic Bishop of Chicago would not be binding precedent in the context of

religiously affiliated colleges, even if a majority opinion contained dicta concerning these colleges. Although some Justices have, on occasion, issued statements on matters not before them, it would be highly unlikely for a majority of the Justices to use the occasion of their opinion in this case to rule that the Board lacks jurisdiction over all church related schools, including colleges. For to do so would sharply undercut the distinction between elementary-secondary education[35] and higher education[36] which the Court has been at pains to preserve in its decisions on public funding.

It bears repetition that predictions of future Court decisions are chancy. In any event, a stronger constitutional argument against the jurisdiction of the Board can be made by colleges which are owned, operated, managed or controlled by a religious group in such a way as to be "pervasively sectarian" in character than by religiously affiliated colleges which cannot be described in these terms.

(2) EXCLUSION OF RELIGIOUS FACULTY MEMBERS FROM BARGAINING UNITS

Assuming that the Board retains jurisdiction over the majority of religiously affiliated colleges, one final issue remains: whether the Board has exceeded its discretion in excluding, in some instances, religious faculty members from units seeking to be represented for purposes of collective bargaining. A unit determination is necessary only when the employer and employees do not agree on the class of employees to be included in a particular unit. If agreement cannot be reached, the Regional Director makes an initial determination, which is appealable to the Board. Congress has vested

broad discretion in this function of the Board,[37] and courts generally defer to the Board's "large measure of informed discretion...rarely to be disturbed."[38]

In 1971 the Board included seventy Jesuits at Fordham University in a collective bargaining unit on the grounds that they shared a community of interest with approximately 430 laypersons on the full time faculty.[39] This community of interest was manifest in identical provisions of salary and working conditions for both the Jesuits and the lay faculty members. In addition, the Board's task was relatively easy because neither the administration of the university nor the union (AAUP) seeking to represent the employees opposed the inclusion of the Jesuits in the unit.

Two years later, in a case involving a small Catholic college in western Pennsylvania, Seton Hill, the Board reached a result different from that in the Fordham case.[40] It ruled that where members of a sponsoring religious community predominated on the faculty,[41] and where the lay faculty sought to exclude the religious faculty persons who were under a vow of obedience to the Mother General of the Sisters of Charity (also a trustee of the college), there was a sufficient divergence of economic interests to exclude these sisters from the unit. Even though their salary levels were technically the same as those of the laypersons, for example, the sisters' wages "were paid directly to the order and the sisters were committed by contract to return a set percentage of these salaries to the college as an annual gift."[42] The college did not appeal this ruling of the Board.

After Seton Hill College, at least one Regional Director misconstrued the Board's ruling to mean that religious faculty

persons could, in effect, never be included in a collective bargaining unit.[43] But the Board reversed this determination, for "unlike the situation in Seton Hill, both the lay faculty members and the administration saw a sufficient community of interest between l ity and sisters to warrant inclusion and the order did not own or administer the college."[44]

The next opportunity for the Board to rule on this issue was in a 1976 decision concerning Niagra University.[45] The lay faculty contended that all members of religious orders who take a vow of obedience to a religious superior should be excluded, but the Board rejected this rule as overbroad.[46] The Board also rejected the laypersons' contentions concerning the vow of poverty, stating that "the way a person chooses to spend his or her money is [not] a relevant consideration with respect to questions of unit placement."[47] Accordingly the Board reversed the Regional Director with respect to religious faculty members who were not members of the Vincentian Fathers (the order which controlled the university) but sustained the Regional Director's exclusion of the Vincentian Fathers. Among the reasons for the exclusion of the Vincentians were the facts (1) that they "not only lived rent-free in a building owned by the university but also shared the housing with some Vincentian administrators of the university" and (2) that "their salaries went directly to the Vincentian order and the order made an annual gift to the university equal to that part of their total salaries not used for necessities and upkeep."[48]

The university appealed this decision of the Board to the Second Circuit Court of Appeals, which refused enforcement of the Board's order.[49] Judge Mulligan ruled that the exclusion of the Vincentian

Fathers from the unit was arbitrary and inconsistent with the Board's position that it has little or no interest in the religious vows of poverty and obedience.[50] For Judge Mulligan, the chief criterion for establishing a bargaining unit appears to be economic community of interest. Hence, "similarities between the lay faculty and Vincentians in wage scale and working conditions (e.g., probation leave, promotion, academic freedom and eligibility for the employer's life insurance and retirement plans) were sufficient to justify inclusion of the Vincentians."[51]

Virtually simultaneously to the events in the Niagra case, another case of exclusion of religious faculty from a bargaining unit was evolving at St. Francis College in Loretto Heights, Pennsylvania. The union sought to exclude six Franciscans from the unit, and the Regional Director did so. The college appealed this decision to the Board, which sustained the determination of the Regional Director, without reaching the contention that the exclusion of the priests constituted religious discrimination in violation of Title VII.[52]

The college appealed the Board's ruling to the Third Circuit Court of Appeals, which emphatically declined to rule on the religious discrimination issue,[53] but which found the Board's unit determination to be arbitrary and unreasonable.[54] Citing an earlier labor law decision in the Third Circuit, Judge Hunter suggested that if the Board has reached different conclusions in similar cases, "it is essential 'that the reasons for the decisions in and distinctions among these cases' be set forth to dispel the appearance of arbitrariness."[55] In particular, Judge Hunter criticized the Board for trying to probe subjective "states of mind,

motives, or individual preferences" of employees in determining community of interest,[56] and intimated that the Board should articulate reasons for its decisions based on the traditional criteria on which it has relied in the past. Citing from a leading treatise, the judge mentioned the following criteria:

> (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.[57]

Neither the Niagra University case nor the St. Francis College case means that the Board is foreclosed from excluding religious faculty members from a faculty bargaining unit.[58] As was stated above, the determination of an appropriate unit "involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed."[59] From these two cases, however, a chastened Board might learn to be more careful in its fact-finding and more sensitive to the desire of religious faculty members to retain first-class citizenship in the labor field. In terms of its own self-interest, the Board should be aware of the serious damage it can do to its own reputation in enforcing the labor policy if it were perceived to be favoring a most odious form of employment discrimination, that based on religion.

C. POLICY RECOMMENDATIONS

The function of the courts is to construe the meaning of the generic language enunciated in the statutes such as the NLRA. If a ruling of the Supreme Court were to appear to a majority of Congress

to be contrary to their intent, they would be free to amend the statute in such a way as to "reverse" the Court on that point. In this sense, Congress not the Court has the final word on labor law.

The Court has not yet accepted review of the Yeshiva case, and itsawaited decision in Catholic Bishop of Chicago will probably not govern the jurisdiction of the NLRB over church related colleges, at least if they are not "pervasively sectarian." Accordingly, it would be premature for the Sloan Commission to consider statutory changes in the NLRA concerning the Board's jurisdiction over these colleges.

Similarly, the authors of this study do not think that it is necessary for the Commission to consider any specific statutory changes concerning the placement of religious faculty members in bargaining units at these colleges. The Board and the federal courts are currently in dialogue over this issue, and this exchange of views is likely to continue before a definitive rule emerges. If the Commission is concerned with enlarging this dialogue between governmental officials and administrators of religiously affiliated colleges, it might achieve this result by suggesting that the NLRB proceed in this area not along its customary path of case by case adjudication, but by the process of administrative rule-making open to all interested parties.[60]

CHAPTER EIGHT

THE FAIR HOUSING ACT AND THE SEGREGATION OF STUDENT HOUSING ON THE BASIS OF SEX

A. THE DATA

Two respondents to the Center Survey indicated that the federal prohibition of gender-based discrimination in housing has the potentiality of interfering with the exercise of religious tenets espoused as institutional policy at church related colleges. The first college was apparently troubled by being required to integrate its housing on a racial basis; such at least is the interpretation we place on the enigmatic comment of this respondent: "It was only one year earlier [than 1968] that the black race was admitted [to the college] at all."[1] The other respondent voiced no complaint whatever with the requirement of racial equality enunciated in the statute, but stated that the 1974 amendment to the Act which added "sex" to unlawful categories of discrimination was the source of its difficulty.[2]

Even though only one institution has pointed to this statute as raising a serious conflict with religious principle, the matter deserves the serious concern of the Sloan Commission not only because of the publicized nature of the conflict between the university in question, Brigham Young University, in Provo, Utah, and the government, but also because it provides an example of mutual accommodation of legitimate interests when civil discourse occurs among campus administrators and governmental officials.

B. LEGAL ANALYSIS

Section 804 of the Civil Rights Act of 1968 makes it unlawful to discriminate in the sale and rental of dwellings specified in

section 803, if the discrimination is based on the race, color, religion, or national origin of the person applying to rent or to purchase the dwelling.[3] Section 805 contains a similar prohibition against discrimination in the financing of housing,[4] and section 806 prohibits such discrimination in the provision of real estate brokerage services.[5] Section 807 granted to religious organizations an exemption limited to preference for persons of the same religion in the sale, rental or occupancy of dwellings owned or operated by the religious organization for other than a commercial purpose.[6]

As originally enacted, this civil rights statute made no reference to sex as an unlawful basis for discrimination in the sale or rental of housing. It also contained a provision allowing religious organizations to exercise preference for their coreligionists in the sale, rental, or occupancy of some buildings such as dormitories or residence halls on the campus of a religiously affiliated college.

In 1974, Congress amended the Act by adding the word "sex" as an unlawful basis of discrimination in the sale or rental of housing units covered by the Act, the financing of such housing, and the provision of real estate brokerage services to persons attempting to buy or rent such housing.[7]

The 1974 amendment did not affect the exemption afforded to certain types of property owned by a religious group. Although it can be risky to rely exclusively on an argument from silence, it should be noted that in 1968 Congress did not include in its statutory exemption churches which profess a religious basis for discrimination on account of race, color, or national origin. By contrast,in 1974 the Congress which explicitly amended the Act to prohibit gender-based discrimination in housing chose not to

withdraw the statutory exemption from religious groups which profess a religious basis for discrimination on account of sex.

The current provisions of the law appear on their face flatly to prohibit gender-based discrimination in the sale or rental of all multi-unit housing units covered by the Act. The only exemption relevant to this inquiry[8] is limited to religious preference, not racial or gender-based discrimination, in the sale, rental or occupancy of housing units owned or operated by a religious organization.[9]

Conflict with this interpretation of the law was engendered by the policy of Brigham Young University, in Provo, Utah. Section 5 of the university's "Living Standards" for students requires unmarried men and women students to be housed in separate buildings, both on and off campus. The basis for this policy is the religious conviction of the sponsoring religious body that extramarital sex is immoral. This belief is enforced not only on the campus, where single students must live either in all-male or all-female dormitories, but also off campus, where single BYU students must live in university-approved separate apartment complexes or wings for single men and for single women.

This policy of the university, and the cooperation of hundreds of landlords in Provo in the maintenance of the policy, were challenged on July 21, 1976 when a female non-student filed a complaint with the Department of Housing and Urban Development (HUD), which has primary statutory authority and responsibility to administer the Act.[10] In this complaint the woman alleged that she had been denied an apartment by a Provo landlord because of her sex, in violation of section 804(a) of the Act. The apartment complex was on the university's approved student housing list. The landlord

had declined to rent a vacant apartment to the complainant because the apartment was in the area reserved for single men, under the terms of an agreement with the university.

Section 810 of the Act requires that if HUD decides to resolve a dispute involving allegation of housing discrimination, it "shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion."[11] Efforts to resolve the matter through conciliation were unsuccessful. On April 13, 1977 HUD referred the complaint to the Civil Rights Division of the Department of Justice, which is authorized by section 813 of the Act to take appropriate action to eliminate a "pattern or practice of resistance to the full enjoyment of any of the rights granted by this [act]...[which] raises an issue of general public importance."[12]

After an investigation of the complaint, on February 28, 1978 Frank E. Schweb, Chief of the Housing and Credit Section of the Civil Rights Division, with the approval of Drew S. Days, III, the Assistant Attorney General for that Division, wrote to Hal Visick, General Counsel of BYU, stating that he had concluded that the denial of apartments on account of sex which resulted from the university's policy and its agreement with landlords in Provo, was in violation of the Act.[13] The Justice Department letter rejected the university's contention that the Act could not be read to abridge the university's Free Exercise rights, and threatened to file suit against the university and 36 individual landlords, to whom a copy of the letter was sent.

From the point of view of the university, there were two encouraging notes in the otherwise ominous communication from the Department of Justice: (1) the failure of the Justice Department

to insure that its letter reached the campus before it was in the hands of the media, which enabled the university to go public with its story, and (2) the suggestion that the filing of the lawsuit could be postponed for thirty days to enable the university to meet with attorneys from the Department to explore the possibility of a negotiated settlement which would correct the situation "while at the same time limiting federal intrusion into the practices of BYU and the landlords to the minimum compatible with equal opportunity."[14]

A week after receiving the letter from the Justice Department, Dallin H. Oaks, President of the University, wrote to Assistant Attorney General Drew Days, posing a series of six questions which suggested a number of logical absurdities in enforcing the law with the strict literalness intimated in the Department's letter. Oaks added:

> We are also troubled by the fact that the Justice Department, which is charged with protecting the civil rights of all citizens, here asserts a right based on statute against our constitutional right to free exercise of religion guaranteed by the First Amendment. We cannot believe that our proscription against students living with or next to persons of the opposite sex is a sufficient injury to justify interference with the fundamental right of religious freedom at this church-sponsored university. This is particularly true when students know and accept our rules when they enroll and can obtain the privileges you seek to enforce simply by attending another institution.[15]

Noting that the Justice Department letter was in the hands of the local media for a week before it was received at the University,[16] Oaks expressed the hope that: "Future exchanges of information and negotiations may be conducted more privately, though each of us will, of course, need to make our final positions known publicly when we have completed our preliminary communications and negotiations."[17]

Within weeks the case achieved national attention. Editorial commentary uniformly backed the university. The New York Times questioned whether there can be sex discrimination "where neither sex is being treated better or worse than the other."[18] Referring to the First Amendment issue implicated in the threatened lawsuit, the Los Angeles Times described the action by Justice as "an abrasive, meddlesome intervention in a situation where the discrimination alleged is more theoretical than real, and where the risk of government intrusion in the area of religious freedom is more real than theoretical."[19] The Boston Herald American editorialized bluntly: "Needless to say, the Justice Department goofed. As one of its own officials admitted, 'any suit that would try to put men and women in the same room could quite justly be classified as kooky.'"[20] Commentator George Will simply described the government as a "pest."[21]

Probably in response to the pressure of this editorial commentary, the Justice Department backed off of its initial hard-line position. The negotiations which ensued between the university and the Civil Rights Division yielded a maximum of candor with a minimum of difficulty or delay. The government attorneys made it clear that they would not seek to require the university or the landlords to permit an unmarried student to share an apartment with a person of the opposite sex. The university, for its part, made it clear that its concern was to preserve intact its ability to effectuate within its student body the ethical teaching of its sponsoring church concerning extramarital sex.

On June 8, 1978, a little over three months after the university was initially notified that its practice was in violation of the

Act, the Assistant Attorney General for the Civil Rights Division and the Chief of the Housing Section in that Division signed on behalf of the Justice Department, and the President and the General Counsel signed on behalf of the university a seven-point agreement ending the dispute. In this agreement the government conceded (1) that it would "Not initiate any legal action against BYU that would interfere with BYU's right to continue to require its students to live in...approved housing,"[22] (2) that the university had a "right to agree with individual landlords that identified buildings or wings [would] be rented exclusively to single students (including separate complexes or wings for single male students or single female students),"[23] and (3) that "so long as any off-campus landlord complies with the practices contemplated by this agreement, the United States shall not initiate legal action against such complying landlord...."[24] For its part, the university acceded to the government's position that it would be unlawful to apply to non-students the university's policy restricting off-campus apartment complexes or wings to persons of one sex.[25] And the university agreed to "use its best efforts to ensure that facilities for single male and female students are comparable in quality and quantity."[26]

Perhaps the most salient features of the agreement are: (1) the extension of the principles agreed upon to "single students enrolled at other educational institutions, similarly situated to BYU, which, on the basis of religious or moral principle, provide for the sexual separation of their single students in housing"[27] and (2) the mutual promise of the parties to "exchange information in good faith to assure the accomplishment of this agreement, and [to] endeavor to resolve any difference that may arise between them by negotiations."[28]

After this accord was reached, commentator James J. Kilpatrick observed with his customary tartness:

> There are times, working in Washington, that one longs for a modern-day Jonathan Swift to satirize the lunacies of our times. We cried out for Swift the other day in the matter of the Great Brigham Young Memorandum of Sexual Settlement....
>
> The Justice Department is pleased. It is wonderful, believe me, what victories our government can achieve when it tries. It might be more wonderful still if victories such as this one never were sought at all.[29]

C. POLICY RECOMMENDATIONS

This case suggests two areas for the consideration of the Sloan Commission: (1) the method of achieving agreement between campus administrators and governmental officials, and (2) the language of the statute in question.

(1) CONCILIATION IN DISPUTE RESOLUTION

The BYU case had a rocky beginning precipitated by the faux-pas of the premature release of the Justice Department's letter to the media. Campus administrators may see in this an important lesson: if placed in a similarly awkward position by an inept official, they might well find a potent ally in the media.

Once the initial fracas died down, however, both parties to this dispute adopted a temperate tone. And the Justice Department made an effort to explore the possibility of conciliation, even though such efforts by another governmental agency (HUD) had failed. The speed and lack of expense with which this dispute was successfully resolved all add up to a refreshing chapter in the generally stormy history of the relationship between government and higher education. The members of the Sloan Commission might do well to commend the parties to this episode for their contributions to successful dispute resolution short of full-blown

litigation, with its accompanying expense and delay. The Commission might also commend both to college administrators and to governmental officials the methods of mediation and conciliation employed in this episode as appropriate in the resolution of analogous disputes between the government and institutions of higher education.

(2) STATUTORY REVISION

Secondly, in light of the government's initial refusal to acknowledge the existence of a First Amendment issue in this episode, and even more tellingly in light of its subsequent acknowledgment that the agreement with BYU would apply as well to "single students enrolled at other educational institutions, similarly situated to BYU, which, on the basis of religious or moral principle, provide for the sexual separation of their single students in housing," the Commission may also wish to recommend to Congress that it amend the Fair Housing Act by adding to section 807 language such as the following:

> Nor shall anything in this subchapter be construed in such a way as to abridge the First Amendment right to Free Exercise of Religion on the part of any religious organization, association, or society, or on the part of any non-profit institution operated, supervised or controlled by or in conjunction with a religious organization, association, or society which, as a part of its religious or ethical teaching, requires the separation on the basis of sex of unmarried persons not members of the same family in housing units operated by or in conjunction with such religious organization or nonprofit institution to which the religious organization is affiliated.

CHAPTER NINE

SEX DISCRIMINATION IN EMPLOYMENT PRACTICES AND IN ACCESS TO FEDERALLY FUNDED PROGRAMS

A. THE DATA

Several respondents to the Center survey commented on the federal prohibition of gender-based discrimination in employment practices (Title VII of the Civil Rights Act of 1964)[1] and in access to federally funded educational programs (Title IX of the Education Amendments of 1972).[2] For some respondents the statutes do not apparently create any religious difficulty or constitute an interference with the religious goals of their institutions. For example, one respondent complained of the Title VII ban on sex discrimination simply because their experience has been that it creates an atmosphere where female applicants are preferred over better qualified male applicants.[3] Another respondent explicitly stated that Title IX created "no religious problem" but had simply "forced them to open nursing programs to males."[4]

Other institutions, however, view Title VII and Title IX as an interference with their religious character. For example, a respondent at a midwestern Catholic university stated that "hiring of members of religious order has been made more difficult since qualified members of religious order are predominantly male."[5] Another respondent stated that because of Title VII and Title IX the administration at his college felt "less free to select persons whose religious beliefs are consistent with the church/college."[6] A Catholic seminary president stated that his institution was under pressure from federal officials to hire more women and to admit

women into the theological program, which at this seminary is designed for the formation of celibate males to enter the priesthood.[7] The president of a large university stated that Title VII is of great concern within the religious group affiliated with the university "because of the religious counsel that mothers should be with young children other than employed, unless [employment is] absolutely necessary."[8] The same respondent described Title IX as follows:

> Biggest interference with educational management. Infringement on religious practice in provisions forbidding consideration of abortion, child bearing or marital status or gender-based dress and grooming requirements.[9]

One respondent objected to the "indirect benefit" theory relied upon by the federal government through Title IX, i.e., that regulatory power should attach to an educational institution because students attending it receive public support.[10]

Title IX authorizes an institution which is "controlled by a religious organization" to be exempt from the provisions of the statute if the application of those provisions "would not be consistent with the religious tenets of such organization."[11] The HEW regulations issued under Title IX provide that in order to avail itself of this exemption, the institution must file with HEW "identifying the provisions of this part which conflict with a specific tenet of the religious organization."[12] Aware of this provision, another institution availed itself of the exemption by filing, and explained its action in its response to the Center survey:

> We asked for exemption: we give more religious vocational scholarships to men; few Southern Baptist women enter the preaching ministry; and we make exceptions about unmarried pregnant employees and students.[13]

Another respondent supplied a copy of a resolution adopted by its Advisory Council detailing the reasons why the Title IX regulations prohibiting discrimination on the basis of marital or parental status are contrary to its religious tenets.[14]

Finally the president of a Southern Baptist Bible College stated that even though his institution receives no federal financial assistance nor desires to obtain such assistance, it voluntarily submitted to H.E.W. an assurance of compliance "to document its willingness voluntarily to comply with all provisions of the Title IX statute and regulations which are not in conflict with [the college's] governing principles, as set forth in the attached letter."[15] The letter attached to the assurance of compliance stated:

> We support the aims of the Title IX legislation and in good conscience seek to eliminate all unwarranted distinctions between the sexes. Nevertheless, as a professional training institution for Christian ministries, we are committed to the biblical ethic which makes a clear differentiation in roles between the sexes. The moral standards of the scripture are applied without discrimination to those of both sexes equally. Although some of our regulations would be in conflict with the requirements of certain provisions of the Title IX regulation, they do not represent a distinction in application of standards between men and women....
>
> The items in conflict are as follows:
>
> (1) §86.21(c), under which applicants for admission may not be excluded on the basis of pregnancy, childbirth, termination of pregnancy, etc., and inquiries oncerning marital status may not be made.
>
> (2) §86.31(b)(5) prohibits differing standards of appearance based on sex.
>
> (3) §86.40(b)(1) forbids suspension or exclusion of students who become pregnant, or experience an abortion.
>
> (4) §86.40(b)(5) requires readmission of a student following childbirth or abortion.
>
> (5) §86.57(b) prohibits refusing to hire an application for employment on the basis of pregnancy or abortion.

(6) §86.60 similar restrictions concerning pre-employment status.

So far as we have been able to determine, these are the only provisions of the Title IX regulation which are in conflict with the biblical standards of... [this] College. The Bible condemns sexual relations outside the marriage relationship for men and women equally. Our admissions policies, employment policies, and student life policies reflect this biblical standard. In the same way, biblical standards of role distinction between the sexes are reflected in certain regulations governing grooming and dress. The principles of modesty and decorum which underlie these regulations apply to both men and women without discrimination.[16]

B. LEGAL ANALYSIS

Acting on the authority of Title IX, the Department of Health, Education and Welfare promulgated regulations[17] to "fill in the blanks" left by Congress, or to enforce the statute with greater specificity than Congress provided. These regulations call for moral neutrality on several items as to which religious believers have strong convictions. The first and most troublesome issue concerning the Title IX regulations is whether HEW has offended against the religious freedom of church-related colleges by putting them to their proof concerning a conflict between an administrative regulation and a religious tenet to the contrary.

The data of the Center survey suggests that several respondents regard the Title IX regulations as an intrusion upon the religious integrity of their schools. Dallin H. Oaks, the president of Brigham Young University and of the American Association of Presidents of Independent Colleges and Universities, voiced the objection of such schools both with candor and mild understatement when he testified at recent congressional hearings on the Title IX regulations:

> The question of the proper roles of the sexes in society and questions of sexual morality, pregnancy, parenthood and abortion are all matters of religious and ethical significance. Many institutions directed by members of our association are sponsored by or affiliated with religious groups, and many others are vitally concerned with ethical and moral values. The First Amendment protects religious belief and advocacy from government interference.
>
> The Title IX Regulations touch directly on religious questions. For example, they provide that institutions must be blind to the occurrence of abortion - that hiring, admissions, and classroom policies must not take notice of the fact that a person may have had or procured an abortion. (86.40; 86.57). Many religious organizations believe abortion to be immoral and akin to murder. The Constitution guarantees freedom for the advocacy of this widely held opinion and for religiously affiliated or ethically committed institutions to refuse to admit to their association those who reject it.
>
> In an apparent effort to avoid this problem the Regulations have posed an even greater threat to the fundamental guarantee of religious freedom. While purporting to exempt institutions operated by religious groups, Section 86.12 actually requires such groups to prove to the satisfaction of a government administrator that their "religious tenets" are inconsistent with the requirements of the Regulation. Thus, a government agency reserves the right to judge the content and application of a religious tenet, and presumably, to deny an institutions' assertion that its religious belief compels a certain action or teaching. By this means government and not the church becomes the final arbiter of religious worship, practice and belief. The First Amendment forbids this. Freedom to advocate and practice religious principles, like the other aspects of academic freedom mentioned above, must be protected from the encroachments of bureaucratic regulation.[18]

There are two counterarguments to the position voiced by Dallin Oaks and others. The first would be that far from behaving in wanton disregard for the religious rights of church related colleges, the government has at least implicitly acknowledged the legitimacy of such claims by providing an exemption for any institution which declares that the regulations are inconsistent with the religious tenets of the government. On this view, the reporting requirements of Title IX are regarded as a minimal inconvenience for administrators

at religiously affiliated colleges who find the requirements of the regulations contrary to the religious tenets of their sponsoring religious bodies.

There are three difficulties with this view. It minimizes the inconvenience to college administrators caused by the filing requirement.[19] It subjects the legitimacy of a religious tenet to the scrutiny of low-level governmental officials.[20] And the "relief" is available only to institutions which are "controlled by a religious organization."[21]

This language arguably creates fewer difficulties for religiously affiliated colleges than does the parallel language of the religious exemption in Title VII, for Justice Powell appeared to state in Hunt that control of a college by a church group would not render it ineligible for public financial assistance.[22] But this may prove to be a slender reed on which to rest if an institution's eligibility for public assistance is challenged in litigation. A plaintiff taking a strict separationist view could point not only to the acknowledgment of church control contained in a particular college's assurance of compliance, but might also urge that specific religious tenets argued by the institution as the basis for an exemption to Title IX regulations are evidence of the "pervasively sectarian" character of the institution. In short, religiously affiliated colleges appear to have been placed on the horns of a dilemma. They may elect to comply with the requirement to file a statement declaring their control by a religious group and their religious reasons for an exemption from an otherwise applicable governmental regulation; in which case they become vulnerable to lawsuits challenging their eligibility for public assistance. Or they may refuse to file the

constitutional values.[29] Secondly, it subjects the exercise of religious beliefs to the "chilling effect"[30] of loss of vital financial support without a showing of a countervailing state interest which is truly compelling.[31] And thirdly, the mode of implementation of this theory - subjecting one's religious views to governmental officials for their approval - could offend against the "excessive entanglement" theory of Establishment Clause analysis.[32] For these reasons, we have concluded that Dallin Oaks is correct in criticizing the Title XI regulations as overreaching and intrusive.

In addition to considering the general arguments articulated by Dallin Oaks, the Sloan Commission should keep in mind the more specific point that one of the few issues in the leading abortion decision, Doe v. Bolton,[33] which yielded unanimity among the Justices of the Supreme Court was that the "conscience clause"[34] of the Georgia statute was not in any sense constitutionally infirm. To the contrary, wrote Justice Blackmun:

> ...the hospital itself is otherwise fully protected. Under S26-1202(e) the hospital is free not to admit a patient for abortion It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions are in the statute in order to afford appropriate protection to the individual and to the denominational hospital[35]

There are significant functional differences between hospitals and educational institutions. Hospitals are not normally called upon to discipline students for the procurement of an abortion, nor do colleges perform abortions. But if a religiously affiliated hospital is constitutionally protected in asserting a right, grounded in moral or religious reasons, not to perform abortions, religiously affiliated colleges should command no less respect in articulating and enforcing a religious conviction opposed to abortion.

C. POLICY RECOMMENDATIONS

(1) STATUTORY CHANGE

In our judgment, the only change in the language of the statute which seems required by our research is the language of "control" contained in the exemption clause. To avoid the dilemma alluded to above, it would suffice to track the sort of generic language employed by the Internal Revenue Service in its commentary on the regulation governing the filing of financial information by a church.[36]

(2) ADMINISTRATIVE REGULATION

There has been considerable debate about the authority of HEW to issue many of the Title IX regulations.[37] It is not necessary to set forth that debate in full here, for the point from that debate relevant to this study is a relatively small but significant one: that HEW can avoid much of the abrasive encounter with religiously affiliated colleges generated by the issuance of these regulations if it would be more accommodating to the legitimate interests of these institutions. For example, the statutory exemption granted to these institutions states simply: "this section shall not apply if the application would not be consistent with the religious tenets of such organization." The language of the Act does not condition the exemption of these colleges from religiously offensive regulations upon anything other than the very inconsistency between the regulation and the religious tenet. There is no statutory duty to file for an exemption, which on its face is automatic. Assuming that there is an important governmental interest in obtaining an assurance of compliance from every institution of higher education which outweighs whatever inconvenience may be

caused to these institutions by the filing requirement, it is still not clear from the plain language of the regulation itself that these institutions are bound to do anything more than to identity the provisions in the regulations "which conflict with a specific tenet of the religious organization."[38] If HEW administrators would abide by the terms of this regulation and cease requiring a list of the religious tenets with which its regulations are inconsistent, let alone an explanation as to why there is a conflict or why the institution ascribes to a particular religious belief in this area, it would undoubtedly save itself a lot of administrative headaches.

Finally, we note that The Chronicle of Higher Education has reported a lengthy delay by HEW over a hundred religiously affiliated colleges which filed for the statutory exemption a year ago, but which have received no response from the bowels of the bureaucracy.[39] We recommend that the Sloan Commission urge the appropriate officials within HEW to manifest their sensitivity for religiously affiliated colleges by responding to these petitions in a fashion more expeditious than the "all deliberate speed" standard of Brown II.[40]

CHAPTER TEN

PARTICIPATION OF SEMINARIES AND SEMINARIANS IN FEDERAL ASSISTANCE TO HIGHER EDUCATION

A. THE DATA

Of the two hundred respondents to the Center Survey, sixteen are seminaries or bible colleges, the chief function of which is to train persons for ministry in a Christian church. When the responses from these institutions are isolated, important data about them are revealed, and significant comparisons can be made with the other institutions of higher education participating in this survey.

Before analyzing these data, we would like to observe that no single stereotype can accurately describe either the student body or the program of study at American seminaries. Most seminarians regard themselves as preparing for ecclesiastical ministry. But a significant number of students pursuing theological studies in a seminary do not have this career goal in mind; they may, for example, desire to be teachers but not preachers. Even if an undergraduate college student in a seminary feels confident that he or she is bound for ministry, that vocational choice is changed in many instances. Either to stress the importance of a general liberal education for ministerial candidates, or simply to accommodate the transition of former seminarians to other academic pursuits or career goals, the undergraduate curriculum at most American seminaries is virtually indistinguishable from the program of studies at comparable small-size liberal arts colleges.

Seminaries differ widely in character, depending on whether they offer undergraduate or graduate programs, and depending on

their relationship to an ecclesial body. Most seminaries are related to a church and have as their primary purpose the formation of ministers, but many are nondenominational or ecumenically oriented. Examples of nondenominational seminaries include Harvard, Yale, and Union. Examples of cooperative ecumenical ventures include the Graduate Theological Union at Berkeley, where students can pursue graduate studies at the University of California at Berkeley; the Chicago Theological Union, where a similar arrangement obtains with the University of Chicago; the Washington Theological Consortium, where students have access to the libraries and staff of the five major universities and to the Library of Congress; and the Boston Theological Institute, where similar access to interfaith and interdisciplinary studies is not merely possible but actively encouraged.

Seminaries and seminarians are entitled to participate in some forms of federal assistance to higher education. An overview of the applicable statutes will be provided in Part B of this chapter. The seminary population in the Center Survey may be too small to form the basis of valid empirical conclusions on the amount of aid received by seminaries or seminarians. With this caveat to scholars, we publish these data, because we are aware of no other study of these institutions which has raised the questions presented in our survey.

The results of the Center Survey suggest that very few seminaries have availed themselves of the grant programs in which they are entitled to participate and that very few seminarians receive federal student aid. For example, only one seminary out

of 16 in our survey reported receiving any institutional assistance during the two academic years 1976-1978; the category of the assistance was not identified but the amount involved in each year was $2,500.[1] To state these data inversely, 93.8% of these institutions received no federal institutional assistance whatever during these two years, and 6.3% received what can only be described as an insignificant amount, whether measured in terms of the federal budget from whence these funds were derived ($401.9billion) or in terms of the mean average annual budget of the seminaries ($1.023 million) participating in our survey.[2]

Fifteen of the sixteen seminaries (93.8%) which responded to the survey indicated that they admit students who receive some form of federal assistance.[3] But this statement does not imply that a significant amount of money flows to many students. Our data account for only 687 students at eleven seminaries who received a total of $1,296,499 in all forms of student assistance, including loans, during academic year 1976-1977.[4] This amount represented 8.4% of the total annual budgets of these institutions. Similarly our data reveal only 621 students at eleven seminaries who received a total of $1,527,679 in all forms of student aid during the following academic year.[5] This amount represented 9.9% of the annual budgets of these institutions. By contrast federal student aid accounts for % of the annual budgets of the non-seminary colleges participating in the Center Survey.[6]

Of these amounts, GI Bill benefits accounted for $221,750 or 17.1% of the total student aid available to respondent seminaries in academic year 1976-1977,[7] and for $258,790 or 16.9% of the aid available to them in the following year.[8] The grant programs

(e.g., BEOG, SEOG, work study program) accounted for $273,345 or 21.1% of the aid available in academic year 1976-1977, and for $502,564 or 32.8% of the aid available in the following academic year.[10] And the loan programs (NDSL, GSLP, and veterans' loan) accounted for $539,494 or 41.6% of the aid available in academic year 1976-1977,[11] and for $760,025 or 49.8% of the aid available in the following academic year.[12]

A predictable but nonetheless significant contrast between seminaries and the other colleges participating in the Center Survey is that a much smaller percent of the seminary respondents indicated concern with the potential for federal statutes or regulations to interfere with the religious mission of these institutions.[13] The single exception to this generalization is that four (25%) of the seminary respondents[14] indicated that they have experienced difficulties with the Family Educational Rights and Privacy Act,[15] popularly known as the Buckley Amendment. The president of a Roman Catholic seminary wrote: "reasons for dismissal from seminary must be part of open record. Certain cases involved men unfit for ordination who should not be recommended elsewhere."[16] Another Catholic seminary administrator stated: "Church law requires confidential inquiries concerning candidates for priesthood."[17] A respondent from a Lutheran seminary objected that the Buckley Amendment "has required a special 'waiver' procedure to be established in order to keep ecclesiastical authorities informed of student progress."[18] And the president of a third Catholic seminary stated that "the nature of seminary formation calls for strictly confidential exchange of information."[19]

From these responses it would seem that at least some seminary administrators consider themselves bound to comply with the provisions of this Act, but it is not clear that Congress intended these institutions to come within the scope of the Act. Although seminaries are not explicitly exempted, the only sanction for noncompliance with the Act is loss of federal funding.[20] Schools and departments of theology are currently excluded from participation in nearly all programs of institutional assistance, but students attending these schools are entitled to participate in various grant and loan programs. In order to assert that seminaries are covered by the Buckley Amendment, the government would have to assert here, as it has in the context of racial discrimination and of failure to provide an assurance of compliance with the prohibition in Title IX against sex discrimination, that student assistance can be withheld from a student wishing to attend a college which is noncompliant with a federal policy.

The applicability of the Buckley Amendment to seminaries raises a collateral question concerning the use of student aid as a vehicle for asserting federal jurisdiction over an institution. The opinions of various seminary administrators concerning student aid are, therefore, relevant to a consideration of this jurisdictional question. One rector wrote: "We favor support of students rather than institutions, so that students can freely choose where to enroll."[21] Another urges a "prohibition against using student aid as an occasion for governmental regulation of internal affairs" and an "imposition of some kind of minimum level of federal aid (more than $100,000) before imposition of requirements."[22] In a similar vein, another seminary administrator wrote: "When a school receives

no direct financial grants, loans, or other benefits from federal and/or state governments, it should not be subject to the same rules and regulations imposed on those who do."[23]

B. LEGAL ANALYSIS

Seminaries and seminarians are entitled to participate in some of the federal programs providing financial assistance to higher education. To elucidate our recommendation for statutory changes allowing additional forms of assistance to these institutions, we provide here a review of the statutes governing these programs and an analysis of the constitutionality of our proposals.

(1) STATUTORY REVIEW

Under existing federal statutes governing higher education resources and student assistance,[24] no seminary or to be more precise, no "school or department of divinity"[25] may participate in the following federal programs granting assistance to institutions of higher education: (1) the community service and continuing education program,[26] (2) the lifelong learning program,[27] (3) the grant program for improving college library resources,[28] (4) the grant program for strengthening research library resources,[29] (5) the grant program for strengthening developing institutions,[30] (6) equipment grants within the program of financial assistance for the improvement of undergraduate education,[31] (7) the grant program for the construction, reconstruction, and renovation of undergraduate academic facilities,[32] (8) the grant program for the construction, reconstruction, and renovation of graduate academic facilities,[33] (9) the low-interest loan program for the construction, reconstruction and renovation of academic facilities,[34] (10) the grant program to institutions of higher education to strengthen and improve the

quality of graduate and professional programs[35] and (11) the program providing general assistance to graduate schools.[36]

A similar prohibition against participation by seminarians in federal assistance to students is found in the following federal programs: (1) fellowships for graduate and professional study,[37] (2) public service fellowships,[38] (3) fellowships to assist graduate students in domestic mining and mineral and mineral fuel conservation,[39] and (4) the energy resource graduate fellowships.[40]

There is no statutory prohibition against participation by a school or department of divinity in the following federal programs of institutional assistance: (1) the grant program for library training and research,[41] (2) the cost of education payments to institutions of higher education,[42] (3) the teacher corps program,[43] (4) the teacher training program,[44] (5) the program for faculty development within the program of financial assistance for the improvement of undergraduate education,[45] (6) grants for programs of cooperative education,[46] (7) the establishment and expansion of community colleges,[47] and (8) the program authorizing grants or contracts with law schools with programs to provide clinical experience in the practice of law.[48]

Similarly, no such prohibition against participation by divinity students in federal aid to students is contained in the statutes governing the following programs: (1) basic educational opportunity grants (BEOG),[49] (2) supplemental educational opportunity grants (SEOG),[50] (3) grants to states for state student incentive (SSI),[51] (4) the special programs for students from disadvantaged backgrounds (e.g., Upward Bound),[52] (5) the low-interest guaranteed

student loan program (GSLP),[53] (6) the national direct student loan program (NDSL),[54] and (7) the benefits to veterans under the "G.I. Bill."[55]

The impact of some of these statutory exclusions and implied inclusions of seminaries and seminarians in programs of federal assistance to higher education may be illusory in character. For example, it does not seem likely that schools or departments of divinity currently offer or are even contemplating the establishment of programs of "advanced study in mining and mineral and mineral fuel conservation including oil, gas, coal, oil shale, and uranium."[56] For Congress to add an explicit prohibition against the awarding of fellowships for such study at a school or department of divinity seems to the authors of this study to partake either of constitutional overkill or the needless repetition of drafter boiler plate. In any event, neither the presence nor the absence of such a prohibition in the grant program would probably have any discernible impact upon the curriculum of seminaries or the ability of seminarians to pursue graduate studies.

By the same token, the non-exclusion and therefore the implied inclusion of seminaries in some of the grant programs authorized in Chapter 28 of Title 20 has probably not had any significant impact upon these institutions either. It seems likely, for example, that seminary librarians may have taken advantage of the entitlement to participate in the grant program for library training.[57] But it is unlikely that many seminary professors have participated in the teacher corps program,[58] the teacher training program,[59] or the faculty development program,[60] or that any seminary has benefited from the programs for cooperative education,[61]

for the establishment and expansion of community colleges,[62] or for clinical experience in the practice of law.[63] Although not explicitly excluded by the relevant statutes from participating in these programs, seminaries and seminarians do not fit within the scope of most of these programs, and to the best of our knowledge do not receive financial assistance from them. These assumptions would, of course, yield to contrary evidence, but we are aware of no empirical data which support the conclusions that these programs afford significant financial assistance to seminaries or seminarians.

(2) ADMINISTRATIVE REGULATION

In addition to the statutes listed above, the Office for Education (HEW) issues regulations governing eligibility for participation in these programs. As might be expected, seminaries and seminarians are not featured prominently in these regulations. But there is at least one instance of a regulation adversely affecting the ability of a seminarian to participate in a federally funded student aid program. The statute governing the College Work Study Program[64] makes no mention of seminaries or seminarians. But the manual[65] issued by HEW to student aid officers who administer this program on campuses throughout the country, and the recently promulgated regulation[66] on this subject formally announcing the viewpoint of the Secretary of HEW concerning student eligibility are clearly designed to exclude seminarians from participation in this program.

(3) CONSTITUTIONAL ANALYSIS

To sum up the statutory and regulatory materials, Congress has excluded seminaries from nearly all forms of institutional

assistance and has similarly excluded seminarians from participation in graduate fellowship grants but entitled them to participate in various other student grant and loan programs. Although Congress apparently intended to include seminarians as eligible participants in the College Work Study program, such participation has been foreclosed for most seminarians by an administrative regulation.

The authors of this study do not feel that Congress was constitutionally compelled in all instances to draw the lines where it chose to do so. Extra-constitutional considerations such as budgetary concerns in an inflationary economy may motivate the decision of Congress to render seminaries or seminarians ineligible to participate in many programs of federal financial assistance. But we detect no obvious constitutional infirmity in inclusion of seminaries in programs of improving library resources or in programs of construction assistance related to library facilities. Nor do we see any reason for excluding seminarians from participation in the College Work Study Program or in other programs of student grants and loans.

(4) LIBRARY RESOURCES

Several states have enacted provisions authorizing the loan of textbooks to all students in elementary and secondary education. In the past decade there has been considerable litigation concerning the constitutionality of these provisions. The leading decisions in this area are Board of Education v. Allen,[67] Meek v. Pittenger,[68] and Wolman v. Walter.[69] These decisions upheld programs in New York, Pennsylvania and Ohio which make available public funds for the provision of textbooks to elementary and secondary students, irrespective of whether the school attended by those

students was public or nonpublic.[70] The theory relied on by the Court in these cases was that the direct beneficiaries of this form of educational assistance were the students themselves rather than the church supported institutions they attend. In announcing the "child-benefit" theory, a majority of the Court rejected the contention that the real beneficiaries of this form of assistance were the institutions who were enabled by these provisions to spend money for sectarian purposes which they would otherwise have to spend on the purchase of textbooks.[71] The first point to be gleaned from these decisions, then, is that the form of the aid appears to be critical in constitutional adjudication. Because students rather than institutions read books, Congress might be regarded as having assisted seminarians in the pursuit of their studies rather than seminaries if it were to eliminate the prohibition against the availability of library resources to schools and departments of theology.

This conclusion cannot be reached on the strength of Allen, Meek, and Wolman alone, unless there were a provision in the amended statute limiting the library grants to books of a nontheological or nonreligious character. For these cases decided only the legitimacy of state loans of "secular" textbooks approved for use in public schools, which must meet more rigid constitutional standards concerning religious or sectarian instruction[72] than would obtain for religiously oriented schools. If library assistance for seminaries were to include books or periodicals of a religious or theological character, several other factors would have to be included in the legal analysis supporting such a program. First, it is the way in which a discipline is pursued which is crucial to Establishment

acts of Congress have been invalidated under the First Amendment;[76] and only one of those cases, Tilton, involved the No-Establishment Clause.

Since 1965, Congress has repeatedly authorized and appropriated funds for federal assistance for library resources not only in church related institutions of higher education[77] but also in similarly affiliated elementary and secondary schools.[78] If such assistance to church related elementary and secondary schools can pass constitutional muster,[79] the case for the constitutional validity of such support within schools or departments of theology would receive additional support in case law, for throughout the past decade the Court has exercised much stricter scrutiny in cases involving aid affecting precollegiate education than in cases involving higher education. In a sense, then, it is but a small constitutional step for Congress to move from entitling students at church related elementary and secondary schools to benefit from additional library resources and audio-visual equipment[80] to entitling students in divinity programs to similar benefits. If Congress can constitutionally provide public funds for the purchase of theological books and periodicals for use in a public library,[81] it strikes the authors of this study as a strained reading of the Establishment Clause to insist that it impedes the Congress from placing these kinds of resources in the places where they are most likely to be read: library facilities connected with a school or department of divinity.

In suggesting this, however, the authors of this study are not entering a prediction that the Supreme Court would not find impermissible assistance to students in divinity programs. Such

a case would come to the court as one of first impression, but it would also come to a decision with some indications in prior cases that the Court might well be inclined to invalidate any public aid to students in any school or department of divinity. For example, in Tilton, Chief Justice Burger noted briefly the statutory exclusion of seminaries from participation in the federal construction assistance program at issue.[82] In Hunt, Justice Powell cited that South Carolina statute which, like the federal statute on which it was modelled, denied assistance for "any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."[83] Similarly in Roemer, Justice Blackmun noted that the annual noncategorical grants provided by the state of Maryland to private college were subject to a statutory restriction that the funds not be "utilized by the institutions for sectarian purposes."[84]

On the other hand, however, it is by no means clear that the policy choice of Congress or of state legislatures excluding students in divinity programs from library assistance is constitutionally compelled by prior decisions of the Court. It is now clear that a state university may, as the University of Iowa has been doing for decades, offer graduate studies in religion without offending the Establishment Clause.[85] And as Chief Justice Burger observed in Tilton, the mere presence of a requirement that students take theology courses does not render an institution ineligible for public assistance if "these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards"[86] and if there were "no attempt to indoctrinate students...."[87]

It should be stressed again that the Supreme Court has never squarely been faced with a decision as to the validity of public assistance for library resources connected with a school or department of divinity. If such aid were authorized by Congress, it is to be hoped that in deciding a consitutional challenge on the matter the Court would not simply repeat mechanistically its tripartite test of secular purpose, legitimate secular primary affect, and absence of excessive entanglement. The validity of the test itself is not self-evident. If the Court is to succeed in persuading its readers of the legitimacy of its conclusions, it will have to pay more attention to significant empirical data,[88] to fresh insights into the role of religion in a pluralistic secular society,[89] and to the historical evidence which suggests that the graduate study of religion might be fostered without affectuating an establishment of religion in any sense remotely resembling the meaning which that phrase had for the Framers.[90]

In our opinion, the Court's tests under the Establishment Clause can be satisfied if serious rethinking is done concerning both the nature of this aid and the real purpose of the Court's tests. For example, with respect to secular purpose, Dean Kelley, in his writing on tax exemption for churches and other religious bodies, has sketched the contours of a secular benefit to be derived from the ongoing presence of these institutions in our society.[91] The Court's second test, primary effect, suggests that empirical inquiry is necessary. As we have suggested in this chapter, there are many kinds of seminaries and many kinds of seminarians. A response to the Court's second inquiry is not furthered by sterotypical characterizations of institutions which are unsupported and unsupportable by reliable data. Finally, application of the Court's third test, excessive entanglement, to this form of assistance would, in the minds of some scholars, undoubtedly be fatal to the

constitutionality of this aid. But we regard this test as inapplicable to library resource assistance, if only because the government ought not under any circumstances insinuate itself as a supercensor into the decision of librarians as to which books and periodicals may be placed on library shelves.

In short, if the Congress were to choose to strike a constitutional balance in favor of library assistance available to students in at least some kinds of theology programs, the values of the Establishment Clause would not thereby be subverted nor would the metaphorical wall of separation which the Clause suggests to some thereby be undermined. As Justice Cardozo said in another context: "There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before."[92]

(5) CONSTRUCTION ASSISTANCE

If the above legal analysis is persuasive, then at least some kinds of seminaries might permissibly be included within the grant and loan programs to assist in the construction or renovation of library facilities. In upholding similar assistance to the four Roman Catholic colleges in Connecticut involved in Tilton, Chief Justice Burger stressed the nonideological character of this form of aid as a factor lessening the entanglement between church and state.[93]

The availability of construction grants to seminaries, even if limited to library facilities, would obviously have the effect of giving more public aid to these institutions than was previously available. Although some of the Justices have recently intimated a concern about the quantum of aid to religiously oriented institutions as a critical factor in their constitutional adjudication,[94]

the "massive aid" theory has never commanded a majority of the Court and need not be regarded as a serious obstacle to a Commission recommendation in this area. A fortiori, the Commission need not tarry over this kind of objection to construction loans for construction or renovation of library resources at seminaries, for the financial benefit derived by an institution from a loan is obviously much smaller than that it would have derived from a grant.

In chapter four of this study we have suggested that the Commission might recommend changes in the regulations governing the use of publicly aided facilities to allow in some instances for religious worship within these facilities. It is, however, a long step to go from this suggestion to the assertion that the government might, for example, expend public funds for the construction or renovation of a seminary chapel. The invalidity of this form of aid, which would be clearly sectarian in purpose and effect does not mean that all forms or such aid must be suspect. Line-drawing is not only possible but necessary in this area. We suggest that the line be drawn at construction grants and loans for construction or renovation of library facilities.

(6) STUDENT GRANTS AND LOANS

As was noted above, seminarians are currently allowed to participate in various federal grant programs such as BEOG, SEOG, SSI, and GI benefits, and in various federal loan programs such as the GSLP and the NDSL. We are aware of no constitutional challenge to the validity of these programs, and we are of the opinion that if challenged their validity would be sustained, if only because of the increasing reluctance of the Court to exercise an active degree of scrutiny over state programs of assistance enabling

students to choose to attend institutions of higher education which might be found "pervasively sectarian" in a case involving institutional assistance.[95]

It was also stated above that by administrative fiat, the Secretary of Health, Education, and Welfare has excluded many if not most seminarians from participating in the College Work Study Program. The HEW regulation renders these students ineligible by defining them as not in "financial need" for purposes of the program requirements.[96]

This regulation might not survive a challenge based on a theory that the Secretary was acting ultra vires in promulgating the regulation, for we have not unearthed a scintilla of evidence in the legislative history which suggests that Congress intended the result achieved by the regulation. A contrary interpretation of congressional intent seems to be a reasonable inference from the inclusion of these students in other grant and loan programs, for if Congress authorized such assistance for needy seminarians in those programs, it probably did not think of these students as legally wealthy for purposes of a program where financially needy students are required to work to receive the benefit to which they might be entitled.

Secondly, we are of the opinion that the regulation does not pass constitutional muster, for it appears to set up an "irrebuttable presumption" concerning the financial need of all such students. Although the Supreme Court has on one occasion allowed this kind of presumption to stand,[97] it has typically viewed such a presumption with a jaundiced eye. For example in Cleveland Bd. of Ed. v. La Fleur,[98] the Court invalidated a mandatory maternity leave without pay for pregnant schoolteachers several months before the expected birth.

In Dept. of Agriculture v. Murry,[99] the Court struck down a provision in the federal food stamp program which made an entire household ineligible for participation in the program if the household included a "member who has reached his eighteenth birthday and who is claimed as a dependent child for federal income tax purposes by a taxpayer who is not a member of an eligible household." And in Vlandis v. Kline[100] the Court invalidated Connecticut's durational residence requirements for tuition benefits to in-state students at a state university.

The "irrebuttable presumption" doctrine has not been regarded with favor by student commentators,[101] and the Court may have already moved away from this mode of analysis. In any event, however, the regulation in question would still be subject to a challenge as a violation of equal protection of the laws implicit in the Fifth Amendment Due Process Clause.[102] Given the lack of support for the regulation in the legislative history, we are of the opinion that the regulation would be set aside in an equal protection challenge.[103]

Finally, as was mentioned above, Congress has chosen to exclude seminarians from participation in a variety of graduate fellowship programs. Some of these programs are so narrow in scope that they would probably not attract many theology students. But in those cases where interdisciplinary research might well include interaction between a scholarly study of religion and of some other discipline, we see no overwhelming reason to believe that the current congressional determination is constitutionally mandated.

C. POLICY RECOMMENDATIONS

Our suggestions to the Commission for possible recommendations to Congress in this area have already been intimated in the legal

analysis set forth above. We merely bring these suggestions together in one place for sake of convenience.

First, we suggest a statutory change deleting from Title 20 of the U.S. Code sections 1027 and 1045 which have the effect of precluding any school or department of divinity from receiving any form of assistance to improve their library resources. If the Commission wishes to adopt a cautious approach here, it may do so by limiting the availability of such funds to the purchase of volumes or periodicals related to archeology or to languages ancillary to scholarly biblical studies. But both the administrative headaches implicit in this suggestion and the overtone of government as censor lead us to conclude that if distinctions must be drawn in this area, it would be more appropriate to differentiate among eligible institutions than to describe with particularity the sorts of books which Congress might think to be offensive for purposes of First Amendment analysis.

Secondly, we favor availability of grants and loans to seminaries for the limited purpose of construction or renovation of library facilities. Once again, the Commission may deem it necessary to differentiate among various kinds of divinity schools. If thought necessary, this kind of line-drawing should be consistent with the distinctions made with respect to grants for library resources.

Thirdly, we see no unsurmountable constitutional hurdles to the inclusion of seminarians within governmentally sponsored student grant and loan programs. Specifically, we recommend that HEW abandon its interpretation of the eligibility requirements for the College Work Study Program and allow seminarians to demonstrate

financial need to participate in this program. And we recommend that, where appropriate, seminarians be entitled to participate in various graduate fellowship programs funded by the federal government.

Some if not all of these recommendations may be controversial, not only in the world of strict separationists intent on keeping the wall between church and state secure, but also within the community of seminary administrators, many of whom perceive themselves as beyond the reach of a host of governmental regulations precisely because they are not recipients of institutional assistance from the government.[104] We have advanced these recommendations in this study in part because we are conscious of the unique opportunity afforded to the Sloan Commission to advance innovative ideas in the domain of higher education. We hope that this opportunity will be seized by forwarding to Congress policy recommendations even where there is debate among legal scholars as to the constitutionality of such proposals. We are aware that it would be irresponsible for the Commission to suggest frivolous ideas which have no chance whatever of being accepted by the Judiciary. But we feel that the Commission would not be in this posture if it were to recommend a general rethinking of the role which divinity schools play in higher education today, or if it were to support the inclusion of these schools in library resource assistance programs including grants and loans for the construction or improvement of library facilities, and the inclusion of seminarians in the College Work Study Programs and other programs of student assistance.

CHAPTER ELEVEN

CONSTITUTIONAL LAW AND THE STATUS OF RELIGIOUSLY AFFILIATED COLLEGES

A. THE DATA

The Center survey generated a predictably high (96.2%) affirmative response to the question whether the survey participants would favor efforts to strengthen the generalized prohibition against intrusion in the internal administration of an institution of higher education by a federal official.[1] Relatively few (13.1%), however, indicated that federal statutory enactments or administrative regulations had actually interfered with the religious mission of the institution or tended to inhibit the exercise of religious tenets of the college or of the members of the religious body to which the college is related.[2] Presented with fifteen specific descriptions of federal statutes and regulations which have the potential of creating this kind of difficulty for these administrators, very few of them identified a quarrel with a particular statute or regulation.

What may be inferred from these data is that administrators at religiously oriented colleges, like their colleagues at independent institutions of higher education[3] complain vigorously about the potential intrusion of the federal government into the lives of their institutions. In addition they assert, in a limited number of instances, that this kind of intrusion is at least unduly insensitive to, if not destructive of, religious values to which their colleges are committed. The very paucity of religiously

based complaints related to a specific statute or regulation, suggests to us that the respondents to this survey reacted soberly and with restraint. When they do lodge a religiously based complaint against a federal statute or regulation, they should be taken seriously.

In the previous ten chapters we have identified several of the problem areas in the relationship between government and religiously affiliated colleges and universities. What remains is the articulation of a generalized theory of constitutional protections available to these institutions in the assertion of such claims. Three distinct claims can be made in support of religiously affiliated colleges. First, like their sister institutions in the public and independent sector of higher education, these colleges are different from purely commercial enterprises or ventures; and the distinctive character of their academic enterprise merits protection on that score alone. Secondly, they are corporate bodies or communities of learning which deserve the same kind of protection available to other groups. And thirdly, they carry on religious traditions, they preserve religious values and they transmit religious messages, and therefore merit to some degree the special protection afforded to religiously motivated individuals and groups.

B. ACADEMIC FREEDOM

There are two senses in which academic freedom is perceived as a value in our society. First, it is a handy phrase which sums up the protections of an individual professor or group of professors against unreasonable intrusions by other members of the college community into the professor's independence in research and

publication, the professor's teaching role including both the content and method of classroom performance, and the professor's civil rights as a citizen of the world including extramural utterances. The classic articulation of these themes remains the 1940 Statement on Academic Freedom and Tenure adopted by the Association of American University Professors and the Association of American Colleges.[4] This statement has subsequently been applied to concrete disputes through the informal structure of "private government" within the academic community, which generally takes seriously any allegation of breaches of academic freedom. Through this process a body of customary law and interpretive commentary, published in the AAUP Bulletin, has developed since 1940.[5]

Courts have frequently relied on this body of customary law in adjudicating claims of violation of academic freedom.[6] For example, in public funding cases, the Supreme Court has often referred to the AAUP-AAC Statement as a touchstone for determining the legitimacy of the funding in higher education[7] while invalidating similar funding for church sponsored elementary and secondary education. And litigants, generally faculty members, involved in suits against institutions of higher education have succeeded in getting courts to take into consideration the AAUP-AAC Statement and other policy documents in adjudicating their claims.[8] Finally, it should be noted that although the Supreme Court has never elevated academic freedom to the status of an independent constitutional right,[9] it has nonetheless been relied upon by the Court as a significant value in the adjudication of cases involving the rights of professors.[10]

The context of these cases gives emphasis to the second aspect of academic freedom asserted here. For the cases in which the

Supreme Court has referred to academic freedom as the rationale supporting its decision frequently if not invariably involve the claim that the federal or the state government has unreasonably intruded into the affairs of the academy, thereby jeopardizing the integrity and autonomy of this community. For example, the Court has set limits to governmental control of curriculum,[11] although without mentioning the talismanic phrase "academic freedom" in those decisions. And the Court has refused to uphold exclusive state control over the process of education,[12] but once again without alluding to academic freedom as the basis for its decisions. Other cases in which the Court has made direct use of the notion of academic freedom have involved the right of teachers to be free from excessively broad loyalty oaths,[13] governmental investigations[14] or an intrusive or overbroad invations of teachers' rights of associational privacy.[15]

The fundamental character of academic freedom as a safeguard against governmental thought control is stressed in the famous dictum of Chief Justice Warren in Sweezy v. New Hampshire:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[16]

In sum, courts have been watchful for violations of academic freedom not only by the authorities within an institution of higher

education, but also by governmental authority itself.[17] Both components of this freedom need to be asserted in protecting the autonomy and integrity of educational institutions.

C. FREEDOM OF ASSOCIATION

Although freedom of association is nowhere specified in haec verba in the Bill of Rights, it has been recognized by the Supreme Court as a corollary of the First Amendment right to freedom of expression. The theory which has developed since the leading case in this area, NAACP v. Alabama ex rel. Patterson,[18] is that the First Amendment protects not only an individual's right to freedom of speech or assembly or right to petition the government for redress of grievance but also concerted activity by a group to exercise these freedoms.

By articulating an independent right to freedom of association, the Court has ensured that the First Amendment guarantees will not be reduced to exclusively solipsistic concerns. Communities as well as persons, are the objects of constitutional safeguards. As De Tocqueville observed over a century ago, the "most natural privilege of man [sic], next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them."[19] Or as Professor Mark DeWolfe Howe wrote, many forms of private organizations in our society are thought of as entitled "to lead their own free lives and [to] exercise within the area of their competence an authority so effective as to justify labelling it...sovereign."[20]

As with the right to academic freedom, the right to freedom of association can be a sword wielded by members of an academic community against a college administration. The imagery of offensive

weaponry is suggested by Healy v. James,[21] the leading case on the associational rights of students. In Healy the Supreme Court ruled that a public university could not withold official recognition to a local chapter of the Students for a Democratic Society (SDS) on the grounds that the history of the group's parent organization included episodes of intentional violence. What was undoubtedly outcome determinative in this case was that in refusing to recognize the SDS as a student organization, the university was effectively foreclosing the group's right to distribute leaflets and other materials protected by the First Amendment. The Healy sword was sharpened recently by the Eighth Circuit Court of Appeals, which prohibited the University of Missouri from refusing to recognize an organization which attempted to provide information concerning homosexuality and to secure recognition of rights for persons oriented to homosexuality.[22]

As with the dominant theme in academic freedom cases, the central message of the freedom of association cases is that the doctrine is at core a shield insulating private groups from unreasonable governmental intrusion. Among such groups are labor organizations,[23] political parties,[24] civil rights groups,[25] the leadership of religious bodies,[26] and the management of banks and corporations.[27]

Although there are no reported decisions of which we are aware squarely holding that the academic community is an organization akin to those mentioned above,[28] there is no logical reason why the protection afforded to these institutions should not also be available to institutions of higher education. To think otherwise would be to suggest that a community of scholars should enjoy less

constitutional protection to act gogether than that enjoyed by the United Mine Workers, the Communist Party, the NAACP, the Orthodox Patriarch of Moscow or his co-chairmen in New York, or the managers of the First National Bank of Boston.

D. RELIGIOUS FREEDOM

(1) TWO PERSPECTIVES: SEPARATION AND ACCOMMODATION

Like public and independent colleges and universities, religiously affiliated institutions of higher education can lay claim to the protections of academic freedom and freedom of association, for they are all bands of scholars working together to advance the state of knowledge. Unlike their sister institutions in the public and independent sector, however, religiously affiliated colleges can legitimately assert the protection of the First Amendment's Religion Clauses, for these institutions to a greater or lesser degree attempt to infuse a religious content into their educational efforts.

The first notion usually associated with the First Amendment protection of religious freedom, is a concept of separation of church and state, derived either from the evangelical Baptist tradition represented by Roger Williams, or from the secular humanist tradition represented by Thomas Jefferson.[29] Indeed, in the minds of many, including several Supreme Court Justices, the sharp differences between Williams and Jefferson pale into insignificance before their common agreement on disestablishment. In other words, the notion of separation of church and state, imaged in the metaphor of a high and impregnable wall, has become virtually coterminous with the very concept of religious liberty. This led one commentator, Professor Nancy Fink to observe that the Establishment Clause has mysteriously eclipsed Free Exercise values.[30]

It has already been noted in chapter ten of this study that several historians dispute the simplistic view of the intent of the Framers espoused by Justice Black in Everson v. Bd. of Ed.[31] and uncritically followed by the Court since 1947.[32] It must now be stressed that, in the opinion of scholars like the late Professor Donald Giannella, the Court has misconstrued and frustrated the purposes of the No-Establishment Clause:

> The strict neutrality principle can...be regarded as the point of departure for the development of nonestablishment doctrine, for in it we find a formula that fully expresses the diverse purposes of the founding fathers in prohibiting the federal establishment of religion....
>
> However, the results derived from the principle of strict neutrality diverge from those flowing from a strict no-aid theory as the sphere of governmental action subject to the establishment clause has expanded. This expansion has occurred for two reasons. First, the due process clause of the fourteenth amendment has extended the non-establishment principle to governmental action on the state level. Second, all levels of government have broadened the scope of their regulatory action. This... has led to a direct clash between the strict neutrality principle, which permits religion to share fully in the social gains resulting from increased governmental action that is religiously neutral, and the strict no-aid theory of nonestablishment, which would deny governmental benefits to organized religion.
>
> ...the founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order. In their view the state was to maintain the public peace and security so that individuals and groups would be free to shape their own destinies. But now that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors. To withhold studiously from religious groups all benefits flowing from governmental structuring of the social order will not only result in deprivations not demanded by the purposes of nonestablishment but in some cases will actually frustrate them.[33]

For our part, we heartily concur with the viewpoint expressed by Professor Laurence H. Tribe of Harvard Law School:

> This approach [flexible accommodation]...recogniz[es] that there are necessary relationships between government and religion; that government cannot be indifferent to religion in American life; and that far from being hostile or even truly indifferent, it may, and sometimes must accommodate its institutions and programs to the religious interests of the people.[34]

(2) THE NO-ESTABLISHMENT CLAUSE

Irrespective of what scholars have written about the Court's general handling of the two Religion Clauses, it is important to note briefly what the Court has in fact said and done under both clauses, and to tease out of these decisions whatever implications may lie therein for religiously affiliated colleges.

Chapter two of this study included an overview of the Supreme Court trilogy on church related higher education: Tilton (1971), Hunt (1973), and Roemer (1976). From these three cases it seems clear that the Court is prepared, in cases involving a challenge brought under the No-Establishment Clause, to make a clear enough distinction between church and campus which renders permissible federal and state financial assistance to church related colleges endowed with principles of academic integrity.

It was also noted in chapter two that the Court appears to have relaxed its commitment to an "indirect benefit" or "conduit" theory in higher education, for it allowed state tuition assistance to students in North Carolina and Tennessee attending religiously affiliated colleges, some of which are remarkably close to the profile of a "pervasively sectarian" institution, which according to the Court cannot be supported with public funds. In summary, the Court has not construed the Establishment Clause in a fashion which is inimical to religious affiliated colleges.

(3) THE FREE EXERCISE CLAUSE

With the exception of two recent cases in federal district courts in Mississippi and South Carolina, we are unaware of any judicial decisions affording the protection of the Free Exercise Clause to religiously affiliated colleges. Both of these attempts, however, are seriously flawed in their analysis, and are likely to be reversed on appeal. In EEOC v. Mississippi College,[35] Judge Harold Cox refused to enforce a subpoena of the Commission seeking information from a Southern Baptist college concerning an allegation of sex discrimination. The college did not deny this contention of the complainant but asserted that the hiring of a male professor for the position in question was a legitimate exercise of religious preference for a Southern Baptist over a Presbyterian. On the strength of this assertion Judge Cox ruled that the Commission was completely without jurisdiction over the college, even though the legislative history makes plain that the statutory exemption relied on by the college is limited to religious preference and not to racial or gender-based discrimination. In our opinion, the district judge erred in his construction of the statute. But unless the panel of judges on the Fifth Circuit who review this decision are sensitive to the Free Exercise rights of hundreds of religiously affiliated colleges in this country who will be affected by the precedent they set, they may deal a severe blow to the statutory exemption itself by approaching it, as the D.C. Circuit did in the King's Garden case, only from the perspective of the No-Establishment Clause.

In Bob Jones University v. United States,[36] Judge Chapman ruled that the Internal Revenue Service would abridge the Free

Exercise rights of the university and of taxpayers wishing a deduction from their gross income for contributions to the university if the Service were to revoke the tax exempt status of the university. The religious interest asserted by the university is the averting of miscegenation or interracial marriage among its student body. The countervaling interest asserted as compelling by the government is its declination to allow a tax benefit to be used in support of a racially discriminatory policy. According to the government, its policy is compelled not only by the Supreme Court's affirmance of the three-judge panel in Coit v. Green,[37] but also by the result in Bob Jones University v. Johnson,[38] where the district court was summarily affirmed in its conclusion that GI Bill benefits to students attending the university constituted a federally funded program within the meaning of Title VI of the Civil Rights Act of 1964, and that these funds would have to be terminated because of the university's racially discriminatory admissions policy. Among the knotty issues presented by this case are the questions of whether the governmental interest in withdrawing passive tax support from this form of racial discrimination is sufficiently strong to outweigh the religious interest asserted by the university, and whether taxpayers have been coerced or compelled by this decision of the IRS to act against their religious beliefs. It will undoubtedly be difficult for the court to resolve these issues carefully, and yet avoid probing into the integrity or legitimacy of the religious beliefs asserted by the taxpayers in this case.

In our view of EEOC v. Mississippi College, the race question ought never to have been litigated in that case, if only because

serious representational difficulties are presented by allowing the complainant, a white female, to press the civil rights of blacks in Mississippi. Even if the Commission can make a strong argument for its view of the standing question, it is regretable that both of these cases, the first two that we are aware of to apply the Free Exercise Clause to religiously affiliated colleges, are clouded with the presence of an allegation of racial discrimination. For it is difficult for many religious persons, as well as for many nonbelievers who are nonetheless respectful of religious values, to view with sympathy the claim that Christianity provides a basis for racial discrimination.[39]

What we advocate in this study is not a blanket exemption of all religious groups, including groups like the Universal Life Church the religiosity of which is less apparent than their eagerness to make financial profit in the name of religion, from all forms of governmental regulation. For, in the words of the distinguished constitutional scholar, Charles M. Whelan, "The salvation of men, not the exemption of churches, is the pearl of great price."[40] The relationship between government and religion which we regard as legitimate is the kind of flexible accommodation commended not only by responsible scholars like Professors Fink, Giannella, Tribe, and Whelan, but also by members of the Supreme Court:

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious beliefs.[41]

(E) SUMMARY AND CONCLUSION

To sum up, the authors have asserted that the federal government must recognize the legitimacy of religious preference in the

selection of faculty and administrators at religiously affiliated colleges (chapter two), the legitimacy of religious preference in the selection of the student bodies at these institutions (chapter three), the legitimacy of use of publicly funded facilities for religious education conducted with academic integrity, and, in some circumstances, for equal access to these buildings for purposes of sacred worship (chapter four), the legitimacy of the moral teaching espoused by some religiously affiliated colleges concerning the use of alcohol and illicit drugs (chapter five), the legitimacy of certain of these schools claiming a relationship to a church body sufficiently close to qualify for an exemption from some provisions of the tax code (chapter six), the legitimacy of including members of religious orders within the community of their fellow workers seeking to be represented in collective bargaining, unless there is an apparent conflict of interest (chapter seven), the legitimacy of enforcing a moral conviction on premarital chastity without incurring the liability of expensive litigation concerning ambiguous language in the Fair Housing Act (chapter eight), the legitimacy of insisting on a range of moral convictions concerning sex and the termination of fetal life without thereby being deemed guilty of sex discrimination and forfeiting as a consequence the benefit of all forms of federal assistance to the institution and its student body (chapter nine), and the legitimacy of continuing the inclusion of seminarians in various student grant and loan programs and of expanding the programs for library resources and construction of library facilities to those seminaries which maintain standards of academic integrity (chapter ten).

In each of these chapters the authors have sought to be faithful to the data of the Center survey (chapter one) and to identify with care the legal analysis supporting the view asserted by administrators of religiously affiliated colleges that some federal statutes and regulations needlessly conflict with profound religious beliefs held by members of communities of scholars committed to the preservation and transmission of their religious heritage in church related colleges and universities.

We have mentioned in this chapter the opinion of Professor Giannella that the Supreme Court has frustrated the purposes of the No Establishment Clause, as well as the view of Professor Fink that the No-Establishment Clause has eclipsed Free Exercise values. We add, in conclusion, that we do not regard it as an overstatement of the data contained in our survey that this problem ascribed by legal scholars to members of the Court is to be found as well among legislators and administrators, who too often have failed to comprehend or to give meaningful protection to the values guaranteed by the Free Exercise Clause of the First Amendment.

In reclaiming those values, our society can receive enormous assistance from religiously affiliated and religiously oriented colleges. It is hoped that the Sloan Commission will listen respectfully to the claims of these institutions to be protected in some respects by the trilogy of values outlined in this chapter: academic freedom, freedom of association, and free exercise of religion and will itself voice the legitimate claims of these institutions or at least will facilitate the hearing of these claims by public policy-makers.

If this occurs, a fruitful dialogue between government and this sector of higher education will ensue. It is our conviction that the results of this dialogue are bound to be of significance and value to our society.

CHAPTER TWELVE

STATE REGULATION

Some of the more important federal regulatory issues for religiously affiliated colleges reappear as problems at the state level. In order to gain an initial sense of the dimension of these problems, two key issues were selected for exploration - restrictions on the exercise of religious preference in faculty and staff employment and in student admissions. We reviewed state anti-discrimination statutes, restrictions on state financial support and possible impact on tax exempt status under state law.

As in the federal arena, most of these issues have not been litigated, and the problems posed by the statutory provisions remain largely untested. As could be expected, there are considerable variations in patterns of state regulation and restriction. As was not entirely expected, there are startling gaps and errors in the statutes of some states which leave even more open to question the outcome of any challenge to the colleges about these matters. The problem is further exacerbated because some provisions are constitutionally questionable, and it is not clear whether a reviewing court would attempt to preserve some portions of the statute in question while striking the offending sections.

We selected the following states in order to gain general impressions about the problem:

1. Alabama
2. California
3. Hawaii
4. Illinois
5. Indiana
6. Kentucky
7. Maryland
8. Massachusetts
9. Minnesota
10. New Jersey
11. New York
12. North Carolina
13. Ohio
14. Oklahoma
15. Pennsylvania
16. Texas

No single law library can maintain all the current sources which together comprise the law in this area. Those sources include not only statutes and judicial opinions but also attorney general opinions, formal decisions and informal opinions and views of various administrative bodies. The available materials were reviewed and answers sought in some instances directly from state officials when answers were not available from written sources.

Because of its limited scope, this work is primarily useful in illustrating the issues, rather than as a definitive final judgment about state regulation in these areas. We do believe, however, that it is possible to make some useful general observations about the situation at the state level. The two most striking conclusions are: 1) there are serious problems presented by state statutes for the exercise of religious preference in employment and student admissions at religiously affiliated colleges, and 2) these problems have rarely been litigated.

A. THE DATA

While general concerns were expressed in the Center survey about state law implications, there were no responses which identified a specific encounter or problem with state law regarding the exercise of religious preference in faculty and staff employment or student admission.

B. RELIGIOUS PREFERENCE IN FACULTY AND STAFF EMPLOYMENT PRACTICES - LEGAL ANALYSIS

(1) Statutory Restrictions

Obviously, there is no single controlling statute to look to as on the federal level, but there is a useful touchstone - the Model Anti-Discrimination Act.[1] This Model Act, like others of its kind, is a product of the thinking and discussion of experts in this field along with state government representatives. After adoption, it is disseminated to state government officials for consideration and recommendation for enactment.[2] Several of the states which we examined had followed in part the language of the Act, which itself, as noted below, borrows heavily from the federal Civil Rights Act of 1964, as amended.

After setting forth a general prohibition against employment discrimination on the basis, among other things, of religion,[3] the Model Act suggests three possible exceptions which might be provided. Each has been adopted in some form in some of the states examined, and each will be discussed separately along with other patterns which appear in individual states.

a) Bona Fide Occupational Qualification

The Model Act substantially follows the wording of 703(e)(1) of Title VII of the federal Civil Rights Act of 1964 as amended, which was discussed in Chapter two. Section 309 of the Model Act provid that it is not a discriminatory practice

> (1) For an employer to employ an employee...on the basis of his religion...if religion...is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise....

"Bona fide occupational qualification" (BFOQ) is not defined either in section 703(e)(1) or in the Model Act. That term appears again in exceptions enacted by eight of the sixteen states examined;[4] in none of those states is the term defined. Some states, like Oklahoma, include the phrase "reasonably necessary to the normal operation of the business or enterprise"; and some, like Massachusetts, do not.

Our research has not identified a single case which deals with this exception as it relates to religion, perhaps because other exceptions are broader. As indicated in chapter two this exception is likely to be restricted to very limited use by the courts, perhaps, for example, to justify use of a particular denominational or religious preference in employing a professor of theology or religion or the president of a religiously-affiliated college.

The BFOQ exception is available to <u>all</u> employers. The Model Act then provides two alternative exceptions which are available only to certain colleges and other educational institutions.

b) <u>Section 703(e)(2) Patterns</u>

The Model Act suggests two alternative provisions (with no comment about why alternatives are provided or under what circumstances either is preferable). Alternative A provides that it is not a discriminatory practice:

> for a school, college, university, or other educational institution to hire and employ an employee of a particular religion if the school, college, university, or other educational institution is, <u>in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society</u>, or if the curriculum of the school, college, university, or other educational institution is directed toward the propagation of a particular religion.

That is, of course, essentially an adoption of the exception in section 703(e)(2) of the Federal Civil Rights Act, the problems and complexities of which are discussed in chapter two. That exception was adopted in four of the sixteen states,[5] essentially verbatim as in Maryland or with variations as in Minnesota.

c) "Operated, Supervised, or Controlled"

Alternative B under the Model Act provides that it is not a discriminatory practice:

> for a religious educational institution or an educational organization operated, supervised, or controlled by a religious institution or organization to limit employment or give preference to members of the same religion.

That pattern is followed in six of the sixteen states[6] but all six added language such as that used in New York "...controlled by or in connection with a religious organization..."[7] which appears to broaden the exception considerably.

d) "Promote Religious Principles or Purposes"

Four of the sixteen states examined adopted another standard in permitting certain religiously affiliated educational institutions to prefer "persons of the same religion or denomination" and, as in Ohio, permit "making such selection as is calculated by such organization to promote the religious principles or the aims, purposes...for which it is established or maintained."[8] That seems to leave a very wide range of discretion to the college.

e) Other Patterns

Other states have patterns of statutory law which range from those of Alabama or Texas with no apparent prohibitions on religious discrimination to that of Maryland which has essentially adopted section 702 of the Federal Civil Rights Act of 1964 and thus

permits employer educational institutions to exercise the broadest religious discretion in employment.[9] That statute is, of course, subject to the same constitutional objections discussed previously in chapter two. California excludes from the definition of "employer" in its fair employment practice statute any organization not for private profit.[10] North Carolina sets forth a ringing public policy declaration against any employment discrimination on the basis of race, religion or sex but provides no consequences for any violation of that policy statement.[11]

f) Interpretation Problems and Drafting Errors

In addition to the usual interpretive problems inherent in statutory enactments generally there are some remarkable errors in drafting which compound the difficulty of advising college administrators about legal consequences of their employment practices.

In Ohio, for example, the provision which purports to provide an exception from Ohio's prohibition on religious discrimination for the religiously affiliated colleges, does so in reference only to housing, so that there is no exception available for employment.[12] Minnesota legislators have drafted a definition of "religious or denominational education institution" which was meant to provide a mechanism to exempt such institutions from the state's religious discrimination prohibition. They neglected, however, to use that term in the appropriate section, so that the statute by its terms now has no exception available.[13] A telephone conference with a representative of the Minnesota Department of Human Rights confirmed that it was indeed a drafting error, although she explained that the department reads the statute as though it had been properly drafted. That, of course, provides little assurance that the next

administrator or reviewing judge would follow this helpful interpretation.

Statutes frequently will provide that the religiously affiliated colleges can give "preference to persons of the same religion or denomination" as that of Ohio.[14] That kind of provision in permitting preference only for persons of the same religion or denomination, is no help to an administrator of a Roman Catholic College, for example, who may seek to give preference to a Protestant or Jewish applicant in order to seek balance or some other goals within a given department. The Model Act is more careful in its drafting section 309(1) in providing for discrimination "on the basis of his religion," but fails to exercise the same care in alternative B in which it permits only "preference to members of the same religion."

C. EMPLOYMENT PRACTICES - POLICY RECOMMENDATIONS

1. Statutory Restrictions

In summary, while these statutory provisions appear to present significant legal problems for the exercise of religious preference in employment at religiously affiliated colleges, there are no reported cases in the statutory annotations examined which raise these issues. That alone does not demonstrate there are not actual problems in these areas, because problems caused by these statutes even to the extent of confrontation with regulatory agency representatives may not have reached the courts. And even though the Center survey uncovered no specific complaints in this area, the impact on college administrative decisions may be real in some instances. Most important, so long as these statutes exist in their current form, they present substantial legal problems which will

surely be troublesome at some point in the future. Those problems can be avoided by corrective action now.

We recommend that the Sloan Commission urge the Council of State Governments to amend its Model Act in the same way that we have suggested that Section 703(e)(2) of the Civil Rights Act of 1964 be amended. The amended Model Act should then be distributed to state government officials through the usual channels with recommendations that serious consideration be given to its adoption.

The rationale for the changes need not be repeated here, but it is important to remove the potential problems and uncertainties caused by the statutes of the various states.

2. Public Funding Implications of State Law

As a general rule it can be stated that the exercise of religious preference in faculty and staff employment appears to have little or no affect on public funding under state law, so long as the institution is otherwise eligible.[15]

A word of caution should be noted, however. Professor A. E. Dick Howard has provided a comprehensive study of public funding of independent higher education in the 50 states in his State Aid to Private Higher Education.[16] While the matter of religious preference in faculty and staff employment is not irrelevant, no case was cited in which a decision about the legality of public funding to a particular institution has turned upon the question of exercise of religious preference.

For example, in 1973 the Supreme Court of Washington included religious preference in faculty employment as one of eleven elements the court examined to determine whether the ten institutions in question were free from sectarian control and influence and thus eligible for financing under the state constitution.[17] The court

determined that the aid in question violated the state constitution, and it is one of the very few cases at the state level in which the question of religious preference in employment matters is mentioned at all.

The survey instrument responses disclose little concern for this issue, and there seems to be no need for a policy recommendation about it.

3. State Tax Policy

As noted in chapter two, there is little law at the federal level with respect to the impact of the exercise of religious preference on the tax exempt status of religiously affiliated colleges. None of the sixteen states examined have in statutory language or by administrative ruling indicated that the tax exempt status of a college would be endangered if it exercised religious preference in employment. The survey disclosed no problems in this area, and there is no need for policy recommendations to the Commission.

D. STUDENT ADMISSIONS - LEGAL ANALYSIS

1. Legislative Restrictions

In the area of student admissions, most states follow the federal pattern in which there is no statute dealing with discrimination in admissions. Other states, however, have adopted the relevant section of the Model Anti-Discrimination Act as part of their general anti-discrimination statutes. Other state statutes deal specifically with problems of equal opportunity in educational institutions. Still others treat this area (either consciously or inadvertently) as part of their regulations against discrimination included in public accommodations statutes.

a) Model Act

Section 502 of the Model Act contains a general prohibition of religiously based discrimination against a student seeking admission. In section 503(1) the Model Act provides that it is not a discriminatory practice for:

> A religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization to limit admission or give preference to applicants of the same religion;

Five states have adopted this provision, but all have added to it.[18] New York, for example, adds to this section the following phrase:

> ...or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

It is probable that the addition of the words "or denomination" insure that such preference can be more narrowly defined than by leaving the relative ambiguity of the phrase "same religion" as in the Model Act. The last phrase regarding "religious principles" is a familiar one and as in the employment area, appears to broaden the exemption and permit greater discretion for the college.

b) Equal Educational Opportunity

New York, Massachusetts and Indiana have all enacted separate statutory provisions to insure "equal educational opportunity."[19] The New York statute provides, for example, that:

> Discrimination in admission of applicants to educational institutions
>
> Declaration of policy. It is hereby declared to be the policy of the state that the American ideal of equality of opportunity requires that students, otherwise qualified, be admitted to educational institutions without regard to race, color, religion, creed or national origin, except that, with regard to religious or denominational educational institutions, students, otherwise qualified, shall have the equal opportunity to attend therein without discrimination because of race, creed, color or national origin. It is a fundamental American right for members

> of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith or to effectuate the religious principles in furtherance of which they are maintained. Nothing herein contained shall impair or abridge that right...
>
> Religious or denominational educational institution means an educational institution which is operated, supervised or controlled by a religious or denominational organization and which has certified to the state commissioner of education, that it is a religious or denominational educational institution.[19]

c) Public Accommodations

New Jersey is one of the few states reviewed which deals with this issue under the public accommodations section of its civil rights statutes.[20] The New Jersey statute excludes "any educational facility operated or maintained by a bona fide religious or sectarian institution." That exemption obviously would not reach a good many institutions which call themselves religiously affiliated, and New Jersey emphasizes in that same section that "private secondary or postsecondary schools" shall not be barred "from using in good faith criteria other than...creed...in the admission of students." That seems to emphasize that unless a college in New Jersey can fit within the narrow definition of the exemption, it is not permitted to exercise religious preference in student admission matters.

d) Interpretation Problems

The kinds of drafting problems cited in the employment section of this chapter continue into the admissions area. One example of this problem is presented by the Indiana statute dealing with equal educational opportunity. There is an initial statement that the public policy of the state of Indiana is:

> To provide, furnish and make available equal, non-segregated, non-discriminatory educational opportunities and facilities for all regardless of...creed....[21]

But a few paragraphs later the policy is stated in terms of the attempt...

> To eliminate and prohibit segregation, separation and discrimination on the basis of...creed in the public kindergartens, schools, public schools, vocational schools, college and universities of the state.[22]

The uncertainty about whether the word "public" modifies the words "colleges or universities" continues through the following two sections, and it is not at all clear whether the prohibitions on the exercise of religious preference reach to religiously affiliated colleges in Indiana.

E. STUDENT ADMISSIONS - POLICY RECOMMENDATIONS

1. Statutory Restrictions

The authors believe that the Sloan Commission should recommend to the Council of State Governments that section 503 of the Model Act be amended as follows:

> Exceptions. Notwithstanding any other provisions of this chapter, it is not a discriminatory practice for 1) a religious educational institution or educational institution operated, supervised, controlled by, or related to a religious institution or organization to limit admission or give preference to applicants of a particular religion or denomination; or....

Obviously this recommendation involves some significant policy considerations. The amendments are intended to expand the class of colleges to include those which are related to religious bodies in ways that are less rigid than the pattern of domination required in the current section 503 and to permit preference to be exercised in favor of students other than those who belong to the same religion or denomination as that to which the college is related.

2. Public Funding Implications of State Law

We found no authority to indicate that the exercise of religious preference in student admissions has any significant effect

on public funding under state law, so long as the institution is otherwise eligible. Again, however, it should be noted that in some cases this exercise of religious preference is one element taken into consideration in determining whether the institutions are under sectarian control which would make them ineligible for state financing.[23]

The survey responses indicate no concern for this issue, and there seems to be no need for policy recommendations about it.

3. State Tax Policy

There was no mention of the exercise of religious preference in student admissions in any connection with state tax exempt status, and the survey responses indicated no problems in this area. There seems to be no need for policy recommendations about it.

CONCLUSIONS

The authors conclude that this initial review of selected state statutes discloses serious legal barriers in many states to the exercise of religious preference in faculty and staff employment and student admissions. These issues are primarily unrecognized or incipient at this time, but that should not obscure the fact that these issues are of central importance for religiously affiliated colleges. These areas need further attention from policy-makers as well as college administrators.

In addition, our work further suggests the need for a comprehensive research project both to extend and refine this analysis of state law regarding the exercise of religious preference in employment and student admissions matters and also to include analysis of all state laws and regulations which impact on religiously affiliated higher education, such as state law limitations

on the use of state funded facilities. The work should be patterned after that performed by Professor Howard with respect to state aid to private higher education. That kind of effort requires substantial time, expenditure of funds and confirmation of initial research with a network of at least one experienced person in each state, since no single law library is capable of keeping up with continuing changes in legislation, judicial, administrative and attorney general decisions in each state.

This kind of work would be, we think, as important a tool as the Howard study to gather into one place a substantial reference work which would detail the history, constitutional and legislative patterns and recent decisions and trends in each state. It would underscore the importance of the problems for religiously affiliated colleges in each state, and would provide an impetus for change where that is necessary.

FOOTNOTES TO THE INTRODUCTION

1. See Manning M. Pattillo and Donald M. MacKenzie, Church-Sponsored Higher Education in the United States, (Washington, D.C.: American Council on Education, 1966), p. 19. Our own survey instrument was mailed to 801 institutions identified by NAICU as church related. Some of those are seminaries, and we have excluded from our analysis, except in section X which deals specifically with seminary issues, responses from sixteen institutions which we were able to identify as seminaries. Compare the recent Council of Churches study which sets the approximate number of church related colleges at 739 - see note 3 infra at 292.

2. Id., pp. 1-53.

3. Robert P. Parsonage, ed., Church-Related Higher Education: Perception and Perspectives, (Judson Press: Valley Forge, Pa., 1978).

4. Note 1 supra, p. 31.

5. Id., pp. 192-197.

6. Note 3 supra, p. 1-41.

7. Id., pp. 73-89.

8. Id., pp. 189-301.

FOOTNOTES TO CHAPTER ONE

1. Manning M. Pattillo, Jr. and Donald M. MacKenzie, Church-Sponsored Higher Education in the United States (Washington, D.C.: American Council on Education, 1966).

2. Robert Rue Parsonage, ed., Church Related Higher Education (Valley Forge, Pa.: Judson Press, 1978). The research for this study was funded by the E. Fay Campbell Lecture Committee, the Ford Foundation, and several denominations engaged in higher education.

3. For example, by 1966, when the Pattillo-MacKenzie study was published, there had been no adjudication of the constitutionality of public funding of church related colleges which exercise religious preference in faculty hiring or student admissions. See chapters two and three, infra. And the following statutes, or regulations issued under the authority of these statutes, had not yet been enacted: the Vocational Rehabilitation Act, see chapter five, infra; the Tax Reform Act of 1969, see chapter six, infra; the Fair Housing Act of 1968, and the amendments of 1974, see chapter eight, infra; and Title IX of the Education Amendments of 1972, see chapter nine, infra. Neither had the National Labor Relations Board begun to assert its jurisdiction over private nonprofit institutions of higher education, see chapter seven, infra.

4. In none of the major sociological profiles of these institutions, such as Andrew M. Greeley's From Backwater to Mainstream (New York: McGraw-Hill, 1969) or C. Robert Pace's Education and Evangelism (New York: McGraw-Hill, 1972), is there an attempt to include the experience of legal difficulty because of governmental regulation within the scope of the investigation undertaken by these authors. This theme is likewise omitted from most of the denominational self-studies of the past decade. See, e.g., Charles R. Bruning, Relationships Between Church-Related Colleges and Their Constituencies (Minneapolis: Lutheran Church in America, 1975), and the literature cited in Parsonage, ed., op. cit.

5. Harry E. Smith, Introduction, in Parsonage, ed., op. cit., p. 12.

6. Loc. cit.

7. "The Society for Values in Higher Education, a national network of faculty and administrators, was asked to provide campus visitors.... Fourteen persons in teams of two spent two days at each of the participating institutions.... They looked closely at how the program, personnel, and climate of the college reflected...the college's church-relatedness.... Their written and verbal reports became a primary resource for the analysis undertaken by the project consultant...." Loc. cit. The campus visitors and their educational institutional affiliations are identified in the appendix, pp. 343-44.

8. The only explanation for selection of the rather small sample (1.75%) offered in the study is that the fourteen colleges included in the sample represented "thirteen different Christian traditions" and "geographical diversity." The reader is told that the authors "consciously excluded large universities and nondenominational Christian colleges." Op. cit., p. 11. If the study is limited to an investigation of church-relatedness, perhaps an intelligent argument can be made for excluding the latter, but that would not explain why large universities such as Boston University, Duke, Notre Dame, or Brigham Young were excluded. In any event, the authors of the Parsonage study have not disclosed with much detail the reasons for their methodological choices.

9. Op. cit., pp. 11-12.

10. Question 23, variable 132, asked the respondents to indicate degrees of agreement or disagreement with the following statement: "It is important that [religiously affiliated] colleges retain the right to exercise preference on the basis of race or sex, whenever that is dictated by the authoritative teaching of the church to which the college is affiliated, without thereby forfeiting their entitlement to receipt of public benefits." For a discussion of this item, see chapter six note 43, infra. Question 31, variable 195, asked: "Does your institution maintain a policy of disciplining students for failure to conform to a code of ethical conduct or of religious beliefs?" Several respondents noted that they could answer yes meaningfully only with respect to the enforcement of a code of ethical conduct.

11. The survey instrument was 12 pages long, and asked 39 questions in the following subject areas: (a) Background data concerning respondent institutions, such as size of faculty and student body (variables 1-9); (b) public funding; assistance to students (variables 10-62); (c) public funding: institutional assistance (variables 63-99); (d) governmental regulation (variables 100-129); (e) religious preference in faculty selection and promotion, and in hiring of administrators and staff personnel (variables 130-185); (f) religious preference in student admissions and religious factors in student discipline (variables 186-203); (g) experience with legal problems in the last decade (variables 204-227); (h) characteristics of plaintiffs and defendants in lawsuits and administrative proceeding.

12. Throughout this study, the survey will be designated to as "Center survey." The source of the information referred to will be identified by the variable on the computer printouts of the data; occasionally a respondent will be identified by the number on the survey instrument returned by that respondent. In any case where the respondent is individually identified by name, we have the consent of the party to do so.

13. Center survey, variable 2.

14. Id., variable 3.

15. Id., variable 9.

16. Id., variable 4.

17. Id., variable 6.

18. Id., variable 8.

19. Id., variable 204.

20. Id., variable 213.

21. Id., variable 222.

22. Id., variable 223.

23. Id., variable 224.

24. Id., variable 226.

25. Id., variable 227.

26. Id., variables 228-34, 236-42.

27. Id., variables 244-49, 252-57.

28. See, e.g., William E. Knepper, Liability of Corporate Officers and Directors (Indianapolis: Allen Smith, 1973), §1.14; Ray J. Aiken, "Tort Liability of Governing Boards, Administrators and Faculty in Higher Education," 2 Journal of College and Univ. Law 129 (1975); William C. Porth, "Personal Liability of Trustees of Educational Institutions," 2 Journal of College and Univ. Law 143 (1975); Ray J. Aiken, John F. Adams, and John W. Hall, Liability: Legal Liabilities in Higher Education: Their Scope and Management (Washington, D.C.: Association of American Colleges, 1976); and Kristen M. Brown, "The Not-For-Profit Corporation Director: Legal Liabilities and Protection," Federation Insurance Counsellor Quarterly (Fall 1977), pp. 57-87.

29. Center survey, variable 63.

30. Id., variable 10 (adjusted frequency; 2 missing cases eliminated).

31. Charles W. Schoenherr, A Self-Study on the Impact of Federal Programs on the Sterling College Campus (Cambridge, Ma.: Sloan Commission, 1977), p. 3.

32. See, e.g., Joseph Kershaw, The Very Small College (New York: The Ford Foundation, 1976).

33. For an example of such an "intrusion," see Schoenherr, op. cit., p. 8.

34. Op. cit., p. 9.

35. See, e.g., William Simon, A Time for Truth (New York: McGraw-Hill, 1978).

36. Center survey, variable 100.

FOOTNOTES TO CHAPTER TWO

1. See Merrimon Cuninggim, "Varieties of Church-Relatedness in Higher Education" in Robert R. Parsonage, ed., Church-Related Higher Education: Perception and Perspectives (Judson Press: Valley Forge, Pa. 1978).

2. Manning M. Pattillo, Jr., and Donald M. MacKenzie, Church-Sponsored Higher Education in the United States (Washington, D.C.: American Council on Education, 1977).

3. Op. cit., p. 50.

4. Ibid.

5. The Principia College Announcements, 1962-63, p. 9, as cited in Pattillo and MacKenzie, note 3 supra, p. 50.

6. Bulletin, Florida Christian College...Annual Announcement for the Academic Year 1962-63, p. 17, as cited ibid. It should be noted that the phrase "Church of Christ" is used in this bulletin in a denominational rather than an ecumenical sense.

7. Bulletin of Rosary College, 1962-1963, pp. 11-21, as cited ibid.

8. Letter from Vernon H. Neufeld, President, Bethel College, to Manning M. Pattillo, Jr., Jan. 4, 1963, as cited ibid.

9. Note 2 supra, p. 5[illegible].

10. Response to variable 130, Center Survey. Unless otherwise indicated, the frequencies indicated in this section are adjusted by the removal of seminaries from the data base and by eliminating missing or invalid cases. 65.4% percent indicated strong agreement; 26.3% indicated that they agreed somewhat; .6% stated that they had no opinion; 4.5% indicated that they agreed somewhat and 3.4% strongly disagreed with the statement.

11. Response to variable 131, Center Survey. 48.6% expressed strong agreement; 24% agreed somewhat; 4.5% expressed no opinion; 14.5% disagreed somewhat; and 8.4% strongly disagreed.

12. Variable 132, Center Survey.

13. Ibid. 21.7% agreed strongly; 18.3% agreed somewhat; 10.3% expressed no opinion; 18.3% disagreed somewhat; and 31.4% disagreed strongly. It is important to note that these figures do not indicate that a proportional number of the respondents actually maintain an employment policy which is discriminatory on the basis of race or sex, but only that these administrators felt that a college affiliated with a church which hypothetically embraces racial or sex-based discrimination within its religious tenets ought not to be penalized for exercising this sort of religious conviction. It might first be observed that the

statement in the survey instrument did not differentiate between racial and gender-based discrimination. Had the statement done so a different response might be anticipated. Secondly, it should be noted that in Runyon v. McCrary, 427 U.S. 160 (1976), the Supreme Court left open the question of whether religiously motivated racial discrimination offends against civil rights statutes or violates the constitution; and it declined review of a case which squarely presented the question, Brown v. Dade Christian Schools, Inc., 556 F. 2d 310 (5th Cir. 1977), cert. denied, 429 U.S. 1063 , 98 S. Ct. 1235 (1978).

14. Variables 133, Center Survey.

15. Variable 145, Center Survey.

16. Variable 142, Center Survey.

17. Variable 148, Center Survey.

18. Variable 149, Center Survey.

19. Variable 150, Center Survey.

20. Variable 162, Center Survey.

21. Variable 159, Center Survey.

22. Variable 165, Center Survey.

23. Variable 166, Center Survey.

24. Variable 167, Center Survey.

25. Variable 168, Center Survey.

26. Variable 169, Center Survey.

27. Variable 172, Center Survey.

28. Variable 175, Center Survey.

29. Variable 176, Center Survey.

30. Variable 177, Center Survey.

31. Variable 179, Center Survey (relative frequency).

32. Variable 181, Center Survey.

33. Variable 182, Center Survey.

34. Variable 183, Center Survey.

35. Variable 184, Center Survey.

36. Variable 185, Center Survey

37. Note 1, supra. p. 80.

38. Loc. cit.

39. The inadequacy of personal pronouns to avoid the semblance of sexual sterotyping has been frequently noted. To avoid awkwardness of style, however, hereinafter the masculine form of the pronoun is intended by the authors of this study to include the feminine.

40. "Achieving the Mission of Church-Related Institutions of Higher Learning," Report of a Conference held on Nov. 29-30, 1976 (Washington, D.C.: Association of American Colleges, 1977) pp. 6-7.

41. James Tunstead Burtchaell, C.S.C., "Sermon at Mass Inaugurating the Academic Year," September 10, 1972, as cited in Notre Dame Report, No. 1 (1972-73) pp. 51-52.

42. Notre Dame Magazine, December 1978, p. 70; see also the final report of the Committee on University Priorities (Notre Dame) which recommended that "the University have a faculty and a student affairs staff among whom committed Catholics predominate" and that "appointments to the faculty and staff continue to be offered by preference to competent members of the Congregation of the Holy Cross, whose contribution to the University is a special guarantee of its Catholic character."

43. Academic Excellence and Professional Growth: The Tenure Policy of William Jewell College, (Liberty, Mo., 1976), p. 8.

44. See Chapter 11, infra.

45. The Supreme Court has both acknowledged that there are instances where both the Free Exercise Clause and the Establishment Clause overlap, see, e.g., McGowan v. Maryland, 366 U.S. 420 (1961), and Braunfeld v. Brown, 366 U.S. 599 (1961), and it has struggled "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Commission, 397 U.S. 664, 668-69 (1970).

46. See, e.g., Gustavus Myers, History of Bigotry in the United States (New York: Capricorn Books, rev. ed. 1960).

47. Section 703(a) of the Civil Rights Act of 1964 provides in relevant part that "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individual's... religion...; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's...religion...." Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. 2000e-2(a).

48. Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. 2000e-3(a).

49. Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. 2000e-3(e)(2).

50. Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. 2000e-3(e)(1).

51. Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. 2000e-1.

52. Remarks of Sen. Harrison Williams, Feb. 1, 1972, as cited in U.S. Senate, Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, Pub. L. 92-261) (Washington, D.C.: Government Printing Office: 1972), p. 1252; see also remarks of Sen. Jacob Javits, id., pp. 1253-54.

53. Pub. L. 88-352, 78 Stat. 255, as amended by Pub. L. 92-261, 86 Stat. 103, 42 U.S.C. 2000e-1.

54. See Legislative History, note 52, supra, pp. 849-53.

55. Id., pp. 843-49, 1216-17, 1227-31.

56. Id., p. 844.

57. Amendment No. 809 to S.2515, id., p. 789.

58. Id., pp. 848-49.

59. Id., p. 850.

60. Id., p. 1667.

61. Id., pp. 1813-14.

62. 403 U.S. 672 (1971).

63. "Rather than focus on the four defendant colleges and universities involved in this case, however, appellants seek to shift our attention to a 'composite profile' they have constructed of the 'typical sectarian' institution of higher education.... Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess [such] characteristics [as to make it ineligible for aid]. We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile'." Id. at 682.

64. Id. at 684.

65. Id. at 686, 687.

66. 413 U.S. 734 (1973).

67. The college was controlled by the South Carolina Baptist Convention to the extent that the church convention elected all members of the college's board of trustees, and the church retained the power to approve certain financial transactions and amendments of the college's charter. Id. at 743.

68. Ibid.

69. 426 U.S. 736 (1976).

70. After Tilton the Maryland statute was amended to provide "None of the moneys payable under this subtitle shall be utilized by the institutions for sectarian purposes." Maryland Laws of 1972, chapter 534 as cited in Roemer, 426 U.S. at 740-41. Compliance with this provision is insured by administration of the grant program by the Council for Higher Education, which both determines whether an institution applying for aid is eligible at all, and requires that institutions that are eligible for funds do not put them to any sectarian use. Id. at 741-42.

71. Id. at 759, citing the District Court opinion, 387 F. Supp. 1282, 1293 (D. Md. 1974).

72. 426 U.S. at 761, referring to Hunt, 413 U.S. at 744, and Tilton 403 U.S. at 682, but ignoring the Court's acceptance of such composite profiles in cases involving elementary and secondary schools; see, e.g., Nyquist, supra; Levitt v. Committee for Public Education, 413 U.S. 472 (1973); and Lemon v. Kurtzman, 403 U.S. 602 (1971).

73. 403 U.S. 602 (1971) (invalidating a Rhode Island and a Pennsylvania scheme whereby the state purchased the services of instructors of secular subjects in nonpublic elementary and secondary schools). In Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973), Justice Powell accepted verbatim from the appellant's brief the contention that religiously affiliated schools in New York placed religious restrictions on faculty appointments. Religious preference in faculty hiring did not, however, become an issue for decision or comment in a subsequent case involving an Ohio statute providing for various forms of aid to students at nonpublic elementary and secondary schools, for the parties stipulated that none of the schools covered by the statute practiced discrimination in faculty hiring on the basis of race, creed, color or national origin. Wolman v. Walter, 433 U.S. 299, 234-35 (1977); see also Wolman v. Essex, 417 F. Supp. 1113, 1116 (N.D. Ohio 1976).

74. 426 U.S. at 749, citing Lemon, 403 U.S. at 618; see also 426 U.S. at 752, note 18.

75. Id. at 757, referring to 387 F. Supp. at 1294.

76. 429 F. Supp. 971 (W.D.N.C.), aff'd, 98 S.Ct. 39 (1977).

77. For a brief statement of the Supreme Court's attempts to reconcile the two Religion Clauses of the First Amendment, and of the sorts of accommodation between the government and the religious interests of the people that are forbidden, permissible and mandatory, see Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978), pp. 819-25.

78. 460 F. 2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972).

79. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (regarding the decisions of the highest church judicatories on questions of discipline, faith, or ecclesiastical rule as final and binding on civil courts).

80. 460 F. 2d at 560. See also Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440 (1969). In Blue Hull the Court stated: "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.... The Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrines." Id. at 449.

81. Id. at 560-61.

82. 498 F. 2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); see Note, "The constitutionality of the 1972 Amendment to Title VII's Exemption for Religious Organizations," 73 Mich. L. Rev. 538 (1973).

83. In re Complaint by Anderson, 34 FCC 2d 937, 938 (1972).

84. 47 CFR 73.125(a), 73.3301(a), 73.599(a), 73.680(a), 73.793(a) (Oct. 1, 1973); see also Non-Discrimination in Employment Practices: Notice of Proposed Rule Making, 13 FCC 2d 240 (1969).

85. 498 F. 2d at 53.

86. Ibid.

87. Id. at 55.

88. Ibid.

89. Id. at 57.

90. Ibid.

91. Id. at 57-58. The Commission exempted from the ban on sectarian hiring "the employment of persons who work is...connected with the espousal of the licensee's religion." Id. at 59.

92. Id. at 61 (Bazelon, Chief Judge, concurring).

93. 419 U.S. 996 (1974). Denial of certiorari cannot, of course, be construed as a ruling by the Supreme Court on the merits of the case, but only as notice that fewer than four members of the Court wished to hear the case. Hughes Tool Co. v. TWA, 409 U.S. 363, 365 n.1 (1973); Brown v. Allen, 344 U.S. 443, 489-97 (1953); Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (opinion of Frankfurter, J.).

94. 460 F. 2d 553, 558.

95. Legislative History, note 52, supra, p. 1845 (remarks of Sen. Harrison Williams); see also at p. 1814.

96. 10 EPD ¶ 10, 289 (N.D. Cal. 1975), rev'd and remanded on other grounds, 535 F. 2d 1182 (9th Cir. 1976).

97. 10 EPD ¶ 10, 289 at 5191.

98. Plaintiff Lorna Tobler was employed by the defendant in the position of editorial secretary to the editor of the major monthly periodical published by the press. Plaintiff Merikay Silver was employed by the defendant in the position of editorial assistant in the book department. Id. at 5189.

99. Id. at 5190.

100. Ibid.

101. 451 F. Supp. 564(S.D. Miss. 1978).

102. Judge Cox noted that the college is "owned, controlled, and operated by the Mississippi Baptist Convention as a part of its Christian Mission Program." Id. at 565.

103. Id. at 566.

104. Civ. No. C. 74-287, D. Utah.

105. Amended Complaint, ¶ 16(c).

106. Id., ¶ 16(d).

107. Id., ¶ 20.

108. Id., ¶ 21.

109. Id., ¶44.

110. Id., at p. 11.

111. EEOC Decision No. 75-186 (Feb. 21, 1975).

112. To refer a major piece of civil rights legislation to the Senate Judiciary Committee in 1964 would have been to fulfill Woodrow Wilson's famous characterization of a bill crossing "a parliamentary bridge of sighs to dim dungeons of silence whence it will never return."

As a sample of the kind of opposition by Southern Democrats to this legislation, see the following colloquy between Senators John McClellan (Dem. - Ark.) and Herbert Talmadge (Dem. - Ga.):

> Mr. McClellan. The more I study the bill and the better I understand it, the more convinced I am that it is misnamed.... A more accurate and descriptive title, I believe, would be "The Discrimination Act of 1964," rather than a civil rights bill....
> Mr. Talmadge. Would not a more apt title of the bill be a bill to regulate the American people? Is that not what the bill purports to do?
> Mr McClellan. It not only undertakes to regulate them in their business; ultimately it will prove to be the opening wedge to regulate them in their social life and, in a measure, to regiment them politically....
> Mr. Talmadge. I ask my able friend if the bill does not regulate where people sleep.
> Mr. McClellan. It attempts to do that. I am one of those who believe that it is not possible to regulate those things by law. There are certain intuitions in a human being that statutes will not inhibit. I do not think the bill...will be enforceable in some of those areas where it attempts to invade privacy and the right of decision and choice by an individual to pursue happines.
> Mr. Talmadge. I ask my friend if it does not regulate where people eat.
> Mr. McClellan. It attempts to do that....
> Mr. Talmadge. I ask my friend if the bill does not regulate where people work...?
> Mr. McClellan. There are not many areas of human activity ...which the bill does not attempt to invade....
> Mr. Talmadge. Is it not true that the bill purports to regulate the American people and to extend the Federal police power of the United States Government in every area of private, human conduct from the cradle to the grave?
> Mr. McClellan. Yes. If the proponents have skipped anything, it is evidently due to an inadvertent omission, and [is] not intentional....

Bernard Schwartz, ed., Statutory History of the United States: Civil Rights (New York: Chelsea House, 1970), pp. 1302-03.

Stirred up to heights of rhetorical fervor by this interchange, Senator McClellan also felt obliged to make the case for discrimination on the basis of religion:

> Mr. President it may be essential to the success of [a person's] business that he make some discrimination. If he is a merchant, he may very well desire to solicit and procure the patronage of a large Baptist element in the community. He has an opportunity to employ a Methodist and a Baptist of comparably equal talents but he says, 'I believe I should hire a Baptist to work for me in this Baptist community, to appeal to them, in order to get their business'.... We could reverse the situation and say that the merchant wished to get the Methodist trade. Why should he not be permitted to employ a clerk or a salesman who is a Methodist?" Id. at 1306.

113. H.R. Rep. No. 88, 88th Cong., 1st Sess. (1963), as cited in Bernard Schwartz, ed., op. cit. note 112, supra, p. 1074. The courts have accepted the notion that "the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); see also McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 279-280 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

114. 29 CFR § 1606.1(a), issued Jan. 13, 1970, provides:

> The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

115. 29 CFR § 1604.2(a), issued April 5, 1972, provides:

> The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels - 'men's jobs' and 'women's jobs' - tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> (i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.
>
> (ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such sterotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.
>
> (iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.
>
> * * *
>
> (2) Where it is necessary for the purpose of authenticity of genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.

See also Diaz v. Pan American Airways, 442 F. 2d 385 (5th Cir.) cert. denied, 404 U.S. 950 (1971).

116. 29 CFR § 1605.1, issued July 13, 1967.

117. 29 CFR § 1605.1 provides:

> Observation of the Sabbath and other religious holidays.
>
> (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

118. For litigation challenging the authority of the Commission to issue these regulations, see Dewey v. Reynolds Metal Co., 429 F. 2d 324, (6th Cir.) aff'd, 402 U.S. 689 (1970); and Kettell v. Johnson and Johnson, 337 F. Supp. 892 (D. Ark. 1972). Following the Kettell case, Congress enacted the Equal Employment Opportunity Act of 1972, which provided: "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). This removed any lingering doubt by the Courts as to the will of Congress to affirm the guidelines issued by the EEOC. But the Supreme Court has recently made the "undue hardship" phrase the operative part of the legislative enactment, See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63(1977).

119. At the time of the hiring in question, 75% of the faculty in the Science/Mathematics Department were non-Catholic; 86% of the biologists in that department were not Catholic, and the one Catholic biologist in the department was scheduled to retire within three years.

The "critical mass" theory, advanced by many administrators at church-related colleges, is drawn by analogy from nuclear physics. The argument is made that just as there must be a minimum quantum of radioactive material to enable a chain reaction to proceed by means of nuclear fission, so also there must be a minimum number of persons in a teaching capacity at a religiously affiliated college who adhere to the religious beliefs and ethical values espoused by the institution to enable those values and beliefs to take on a incarnate dimension in the educational experience at these colleges. According to this theory, the religiously affiliated college, which may or may not seek a predominance of faculty persons who are members of the sponsoring religious body, should be allowed broad discretion to take into consideration the church membership or religious orientation of any prospective faculty member, irrespective of whether religion might be regarded as a bona fide occupational qualification for that position (e.g., preferring a rabbi to teach Midrashic commentaries on the Torah, preferring a Lutheran or a Presbyterian to teach the history of the Reformation or Luther or Calvin studies). In short, the critical mass theory calls for greater freedom for religiously affiliated colleges in their hiring and promotion policies than does a religious BFOQ exception.

120. Executive Order 11246 was signed by President Johnson on September 24, 1965; it was amended by Executive Order 11375, signed by President Johnson on October 13, 1967, to add sex as a prohibited basis of discrimination. Amended Part I of the Order, dealing with nondiscrimination in employment by the federal government, was superseded by Executive Order 11478, signed by President Nixon on August 8, 1969.

121. Id.

122. Executive Order 11246, 202(1) and (2).

123. See, e.g., testimony of the Rev. James T. Burtchaell, C.S.C., then Provost of the University of Notre Dame, before the Department of Labor, Washington, D.C., Oct. 1, 1975.

124. 41 CFR 60-1.5(a)(5), as amended at 40 F.R. 13218 (Mar. 25, 1975).

125. 41 CFR 60-50.1(2), as amended at 40 F.R. 13218 (Mar. 25, 1975).

126. The Enforcement of Executive Order 11246 was formerly the principal responsibility of the Office of Federal Contract Compliance Programs, but this responsibility was shared with eleven other "compliance agencies." In Reorganization Plan No. 1 of 1978, President Carter proposed to the Congress (1) that the EEOC become "the principal Federal agency in fair employment enforcement," and (2) that by a separate Executive Order, which the President issued on October 1, 1978, that the entire contract compliance program be consolidated within the Department of Labor. See H.R. Doc. No. 95-295, 95th Cong., 2d Sess. (Feb. 23, 1978), at pp. 1, 3. Hearings were held on this reorganization proposal in the appropriate committees of the House and Senate, and on May 5, 1978, pursuant to 5 U.S.C. 906(a), the Plan became law.

127. See, e.g., the Basic Educational Opportunity Grants (BEOG), the Supplemental Educational Opportunity Grants (SEOG), the College Work Study Program (CWS), the "G.I. Bill" providing asssistance to veterans, the National Direct Student Loan Program (NDSL), and the Guaranteed Student Loan Program (GSLP).

128. See the results of the Center Survey cited above in Section I of this study. In a survey of 115 presidents of independent colleges and universities conducted by Dallin Oaks in 1976, all but 2% of the 85 respondents reported that some of their students receive a portion of their support from one of the federally funded programs mentioned above in note 127. Twenty-six percent of the respondents indicated that they received no grants or other direct financial assistance from the federal government; 29% indicated that the amount of such assistance was less than 2% of their total institutional expenditures, including non-academic expenditures such as housing and food service. Another 29% indicated that such assistance accounted for more than 2% but less than 10% of their total institutional expenditures. Only 15% of the respondents indicated that such assistance accounted for more than 10% of their total institutional expenditures. AAPICU Report (April 1976) p. 8.

129. The terms "contract" and "subcontract" in the Executive Order would certainly include research contracts and grants to faculty members from federal agencies. The federal government might in some circumstances make the claim that the term "contract" is broad enough to include the agreements governing various programs of federal grants to students mentioned above in note 127.

This position has been vigorously opposed by administrators at some religiously affiliated colleges who decline as a matter of policy to receive direct institutional assistance so as to remain free from federal regulation under the Taxing and Spending Power. But the government's position has been sustained in cases involving racial discrimination. In Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1975), aff'd per curiam, 529 F. 2d 514 (4th Cir. 1975), the Courts sustained a ruling of the Veterans' Administration terminating the university's eligibility to enroll students who receive federal assistance under the G.I. Bill. The Court held that by enrolling such students, the university was receiving federal financial assistance within the meaning of Title VI of the Civil Rights Act of 1964, and was therefore subject to the strictures of the Act. See also Norwood v. Harrison, 413 U.S. 455 (1973); Brown v. South Carolina Bd. of Ed., 296 F. Supp. 199 (D.S.C. 1968), aff'd per curiam, 393 U.S. 222 (1968); and Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968) (invalidating State textbook loans and tuition grants in the context of racially segregated private elementary and secondary schools).

It is not clear that the government would make the same claims in the context of religious preference in a federally funded program that it has made in the context of racial discrimination or gender-based discrimination. For there is congressional authority in Title VI of the Civil Rights Act of 1964 to oppose any vestige of racial discrimination in federally funded programs, and similar authority in Title IX of the Educational Amendments of 1972 to oppose gender-based discrimination in federally funded educational programs. As noted above, however, Congress has in Title VII of the Civil Rights Act of 1964 granted a broad discretion to religious corporations to exercise religious preference in their employment practices. For a cogent statement differentiating racial discrimination and religious preference, see Dallin H. Oaks, AAPICU Report (April, 1978) pp. 1-2.

130. Rev. Rul. 71-447, citing Restatement (Second) of Trusts §377 (1959), Comment C: "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."

131. For example, Title VI of the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241, 42 U.S.C. 2000c-6 and 2000d explicitly prohibit racial discrimination in federally funded educational programs. Furthermore, this provision may be regarded as a statutory extension of the constitutionally based policy announced by the Supreme Court in Brown v. Bd. of Education, 347 U.S. 483 (1954).

132. Rev. Proc. 75-50 §4.07, 1975-2 C.B. 587.

133. Section 703 (a) of the Act.

134. Section 702 of the Act, as amended.

135. Section 703(e)(1) of the Act.

136. Section 703(e)(2) of the Act.

137. See Internal Revenue Code, section 501(b).

138. I.R.C. 6033(a).

139. 26 CFR 1.6033 2(g)(5).

140. 41 CFR 60-1.5(a)(5), as amended at 40 F.R. 13218 (Mar. 25, 1975). It is by no means clear that the Department of Labor can be credited with an intent to improve upon the language of Congress in the 1964 Civil Rights Act. For the administrative regulation tracks the language of the statute almost verbatim; and in the only clause in which the drafter of the regulation exercised independence of judgment, the phrase "religiously oriented" modifies "church related colleges and universities." To protect the religious freedom of colleges which are religiously oriented or committed but not necessarily church related or only vaguely so, the word "or" should be inserted between "religiously oriented" and "church related."

141. "Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law.... It is not enough to show that the words used by the legislature have some meaning. Concepts created by case law also have some meaning, but the meaning is ambiguous. It is not clear how wide or narrow the scope is to be. Can it be said that the words used by the legislature have any more meaning than that, or is there the same ambiguity? One important difference can be noted immediately. Where case law is considered, there is a conscious realignment of cases; the problem is not the intention of the prior judge. But with a statute the reference is to the kind of things intended by the legislature. All concepts suggest, but case-law concepts can be re-worked. A statutory concept, however, is supposed to suggest what the legislature had in mind; the items to be included under it should be of the same order. We mean to accomplish what the legislature intended.... The difficulty is that what the legislature intended is ambiguous. In a significant sense there is only a general intent which preserves as much ambiguity in the concept used as though it had been created by case law.

This is not the result of inadequate draftmanship, as is so frequently urged. Matters are not decided until they have to be. For a legislature perhaps the pressures are such that a bill has to be passed dealing with a certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement.... The members of the legislative body will be talking about different things; they cannot force each other to accept even a hypothetical set of facts. The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear.

Controversy does not help. Agreement is then possible only through escape to a higher level of discourse with greater ambiguity." Edward H. Levi, An Introduction to Legal Reasoning (Chicago: Univ. of Chicago Press, 1948) pp. 6, 29-30, 31.

142. Bd. of Regents of Univ. of Calif. v. Bakke, 438 U.S. ____, 98 S. Ct. 2733, 2749, n. 32 (1978) (citing 41 CFR 60-50.1(b) banning employment discrimination on religion).

143. King's Garden, Inc. v. FCC, 498 F 2d 51, 56 (D.C. Cir, 1974).

144. Ibid.

145. See, e.g., The Omnibus Crime Control and Safe Streets Act of 1968, §701(a), P.L. 90-210 , 82 Stat. 210, 18 U.S.C. §3501 and Sen. Report No. 1907, 90th Cong., 2d Sess. 50-51, (1968); and see Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868), dismissed for want of jurisdiction, 74 U.S. (6 Wall.) 506 (1869), in response to the Act of March 27, 1868, 15 Stat. 44, which was passed over President Johnson's veto after the Court had already heard arguments on the merits of the case.

146. P.L. 88-352, 78 Stat. 256, 42 U.S.C. 2000e-e(1).

147. Barbara Lindemann Schlei and Paul Grossman, Employment Discrimination Law (Washington, D.C.: Bureau of National Affairs, 1976) pp. 292-93.

FOOTNOTES TO CHAPTER THREE

1. Center Survey, variable 63; the frequencies indicated in this chapter are adjusted to eliminate missing or invalid cases.

2. Id., variable 10.

3. See section B of this chapter.

4. Center Survey, variable 186.

5. Id., variable 187.

6. Pub. L. 88-352, Title VI, §601, 78 Stat. 241, 42 U.S.C. 2000c-6.

7. "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." Pub. L. 88-352, Title II, §201(a), 78 Stat. 243, 42 U.S.C. 2000a, and see, §202 of the Act, codified at 42 U.S.C. 2000a-1. "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Pub. L. 88-352, Title VII, §703(a), 78 Stat. 255, 42 U.S.C. 2000e-2(a) (emphasis supplied).

8. Pub. L. 90-284, Title VIII, §807, 82 Stat. 84, 42 U.S.C. 3607. See chapter eight, infra.

9. Pub. L. 93-383, 88 Stat. 729, 42 U.S.C. 3604-3606.

10. Francis C. Gamelin, Towards A Master Plan (Washington, D.C.: Lutheran Education Conference of North America, 1970).

11. Garry A. Greinke, Survival With A Purpose: A Master Plan Revisited (Washington, D.C.: Lutheran Education Conference of North America, 1978), p. 63.

12. 4 Wheat. (17 U.S.) 517, 666-713 (1819) (Story, J., concurring). See also Henry Friendly, The Dartmouth College Case and the Public-Private Penumbra, (Austin: Univ. of Texas Press, 1971).

13. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citing The Open Universities in South Africa, p. 10).

14. Pub. L. 94-484, 90 Stat. 2294, 42 U.S.C. 295f-1; for legislative history, see H.R. Rep. No. 94-266, 94th Cong., 2d Sess. (June 12, 1976) at 46-59, cited in 1976 U.S. Code Cong. and Admin. News 4988-5001.

15. Robert M. Rosenzweig, "An End to Autonomy: Who Pulls the Strings?," Change 10 (March 1978), p. 32; see also Science 197 (Sep. 16, 1977), p. 1137; "An Uproar in the Medical Schools," The Chronicle of Higher Education, Jan. 17, 1977, p. 7.

16. Pub. L. 95-215, §1(a), 91 Stat. 1503, 42 U.S.C. 295f-1; for legislative history, see H.R. Rep. No. 95-707, 95th Cong., 1st Sess. (Oct. 13, 1977) at 2, 4-8, cited in 1977 U.S. Code Cong. and Admin. News 4134, 4136-40.

17. 438 U.S. ___, 98 S. Ct. 2733 (1978).

18. Id., Brief Amicus Curiae of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, reprinted in Alfred A. Slocum, ed., Allan Bakke versus Regents of the University of California (Dobbs Ferry, N.Y.: Oceana Publications, 1978), Vol. 3, pp. 311-52.

19. Dallin H. Oaks, "Government Regulation of Higher Education," address before Pennsylvania Assn. of Colleges and Universities, Hershey, Pa., Sept. 25, 1978, p. 11; see also Oaks, "Title IX: Administrative, Legal, and Constitutional Aspects," address before Western College Assn., San Francisco, Ca., March 10, 1977, p. 17.

20. Roemer v. Bd. of Public Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); and Tilton v. Richardson, 403 U.S. 672 (1971) form a trilogy of leading cases on the constitutionality of federal and state financial assistance to religiously affiliated colleges. The Supreme Court recently summarily affirmed two district court judgments upholding state tuition assistance to students attending these institutions. Americans United for Separation of Church and State, 433 F. Supp. 97 (M.D. Tenn.) aff'd, 98 S. Ct. 39 (1977); Smith v. Bd. of Governors of the Univ. of N. Carolina, 429 F. Supp. 871 (W.D.N.C.) aff'd., 98 S. Ct. 39 (1977).

21. 403 U.S. 672, 682 (1971).

22. Id. at 686.

23. See, e.g., Bd. of Ed. v. Allen, 392 U.S. 236 (1968); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting).

24. 403 U.S. 661, 671, n.2.

25. See, e.g., Wolman v. Walter, where the parties stipulated that "none of the schools covered by the statute discriminate in the admission of pupils or in the hiring of teachers on the bases of race, creed, color or national origin." 433 U.S. 229, 234-35 (1977) (emphasis supplied).

26. 413 U.S. 734, 743 (1973).

27. Id. at 743-44 (emphasis supplied) (citation omitted).

28. Id. at 744.

29. As is true with several public funding cases recently, in Roemer it is important to attend carefully to the mathematics of the opinions. Justices White and Rehnquist clearly agreed with the result reached by the Court and would probably have been more expansive if they had the support of a majority for their views. In this sense only does Justice Blackmun's opinion reflect that of a majority. As it is, only three other Justices joined in Justice Blackmun's opinion.

30. 426 U.S. 736, 755 (1976).

31. Id. at 757-58.

32. 429 F. Supp. 871 (W.D.N.C.) aff'd., 98 S. Ct. 39 (1977).

33. At Belmont Abbey College, in recent years approximately 70% of the students have been Roman Catholics. Id. at 874. At Pfeiffer College, approximately 40% of the students have been United Methodists. Id. at 876.

34. Id. at 874.

35. Id. at 876. Because of the history and character of a religiously affiliated college, recruitment of students is in many instances more fruitful among congregations familiar with the college and its ties with the church. Although this kind of recruitment will generally produce a student body predominantly composed of members of the sponsoring religious body, the conscious design of the college may be quite simply to attract students to the campus by using an effective recruitment device.

36. Id. at 874.

37. Id. at 876.

38. See, e.g., Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Rul. 75-231, 1975-1 C.B. 158; and Rev. Proc. 75-50, 1975-2 C.B. 591.

39. See also Bob Jones University v. United States, ____F. Supp. ____ (D.S.C., Civ. Action No. 76-775, decided Dec. 26, 1978), discussed in chapters six and eleven, infra. But see Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C.), aff'd., 529 F. 2d 514 (4th Cir. 1975); Goldsboro Christian Schools, Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977); Norwood v. Harrison, 413 U.S. 455 (1973); and cases cited in note 43, infra.

40. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976).

41. Rev. Rul. 75-231, 1975-1 C.B. 158.

42. See, e.g., Runyon v. McCrary, 427 U.S. 160, 167 (1976); and Brown v. Dade Christian Schools, 556 F. 2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

43. Coit v. Green, 404 U.S. 997 (1971), aff'd. Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971); and see Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

44. Letter Rulings of the IRS are available to the public under the Freedom of Information Act and are indicative of the prevailing policy within the national office of IRS at the time they are issued. But, like technical advice memoranda issued to the regional offices of IRS, they lack precedential value and cannot be cited as controlling in subsequent tax matters.

45. IRS Letter Ruling, Docket No. 774005 (Nov. 16, 1977).

46. IRS Letter Ruling, Docket No. 774007 (Nov. 16, 1977).

FOOTNOTES TO CHAPTER FOUR

1. See, e.g., Clayton v. Kervick, 285 A 2d 11 (1971).

2. Chicago Tribune, Dec. 20, 1978.

3. Variable 114, Center Survey.

4. Ibid.

5. Response #14 to variable 114, Center Survey.

6. Response #85 to variable 114, Center Survey.

7. Response #120 to variable 114, Center Survey.

8. Response #39 to variable 114, Center Survey.

9. Response #18, 21, 67, 75, 115, 122, 158, 166, 172 and 81 to variable 114, Center Survey.

10. P.L. 88-204, 77 Stat. 363, as amended by P.L. 89-329, P.L. 92-318, 86 Stat. 301, and P.L. 94-482, 90 Stat. 2081, 20 U.S.C.A. § 1132(e)-1(B)(iii).

11. 20 U.S.C.A. §1163 e(c).

12. Direct Project Grant and Contract Programs, 45 CFR §100a et seq. (1977) and Financial Assistance for Construction of Higher Education Facilities, 45 CFR §170 (1977).

13. 403 U.S. at 680.

14. 426 U.S. at 756.

15. 429 F. Supp. at 875.

16. See, e.g., Engel v. Vitale, 370 U.S. 421, 437-44 (Douglas, J., concurring) (discussing the legitimacy of the motto "In God We Trust" on currency and coins and in the national anthem, of the prayer used at the convening of public sessions of the Supreme Court: "God save the United States and this Honorable Court," and of use of public funds for purchase of Christmas trees decorated with the words "Peace on earth, goodwill to men"); see also Allen v. Morton, 495 F. 2d 65 (D.C. Cir. 1973) (allowing nondiscriminatory use of federal parkland for celebration of religious events, including a Christmas Pageant of Peace with a nativity creche); Protestants and other Americans United for Separation of Church and State v. Watson, 407 F. 2d 1264 (D.C. Cir. 1968) (remanding for a hearing to decide whether the issuance of a commemorative Christmas postage stamp was so "religious in character and content" as to be prohibited by the No-Establishment Clause); Paul v. Dade County, 11 AJC, Docket 45 (1970), cert. denied, 397 U.S. 1065 (1970); Eugene Sand and Gravel v. City of Eugene (Ore. 1977), 20 AJC, Docket 67 (1977).

17. 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976). Some sense of the high drama of the events which give rise to this kind of litigation emerge from the following description of the facts in Keegan set forth in the brief for respondents in opposition to the university's unsuccessful petition for writ of certiorari to the United States Supreme Court:

> On September 9, 1973, after repeated requests from the student residents of Christiana Towers, Father Keegan, a Roman Catholic priest of the Wilmington Diocese, celebrated Mass in a meeting room in Christiana Commons. The University notified Father Keegan that such activity was inconsistent with University policy; but Father Keegan stated that he and Father Szupper, the priest recognized by the University as chaplain for its Roman Catholic students, intended to continue such services so long as the student residents requested. At the invitation of the student residents, Father Keegan again celebrated Mass in Christiana Commons on September 16, 1973.
>
> On September 23, 1973, the University locked the doors to Christiana Commons, posting a notice that it was closing the building between 9:00 a.m. and 1:00 p.m. to prevent further religious activities in the residence hall. Father Szupper then led the student residents, who had invited him to celebrate a Mass, in a religious worship service immediately outside the Christiana residential complex.

18. 396 F. Supp. 963 (1969).

19. Id. at 975.

20. Id. at 976.

21. See, e.g., Anno.:"Use of Public School Premises for Religious Purposes During Non-School Time," 79 ALR 2d 1148 (1961).

22. 389 A.2d 944 (N.J. 1978).

23. 68 Cal. App. 3d 1, cert. denied, 98 S. Ct. 228 (1977).

24. 389 A.2d 944 at 953, citing Southside Estates Baptist Church v. Bd. of Trustees, 115 So. 2d 697 (Fla. 1959) in which the Florida Supreme Court upheld the temporary use of public schools as a place of worship during non-school hours.

25. Id. at 957.

26. Id. at 958.

27. Ibid.

28. Id. at 959.

29. 397 U.S. 664, 669 (1970) as cited in Resnick. Id. at 959.

30. Note 23, supra.

31. Id. at 9.

32. Id. at 12-13.

33. The principle of uniform access to campus facilities was recently reaffirmed in another context in Univ. of Missouri at Columbia, etc. v. Dalton, 456 F. Supp. 985 (1978). The federal court ruled that while a university had no obligation to provide one of its facilities to faculty organizations, once it did so, it was required by free speech and equal protection constitutional provisions to permit use of those facilities to groups deemed to be labor organizations which had as their goal organization of university employees, even though state law prohibited collective bargaining by university faculty members.

34. That "de minimis" application to building wear and tear was also applied by the Florida Supreme Court in Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959). That case illustrates as well the greatly differing attitudes about these issues. In challenging a use by church groups of local school building similar to that in Resnick, the plaintiffs apparently did not show, and the court did not require evidence about whether there were any direct expenses incurred by the school as a result of this use or any rentals paid by the church groups. It is hard to imagine the Johnson majority adopting that posture.

35. Tilton v. Richardson, 403 U.S. 672 at 686 (1971).

36. See, e.g., Healy v. James, 408 U.S. 169 (1972) in which in a time of widespread campus unrest throughout the country, the denial by the president of Central Connecticut State College of recognition to students seeking to form a local chapter of Students for a Democratic Society was overturned by the U.S.Supreme Court; see also Gay Lib v. University of Missouri, 558 F. 2d 848 (8th Cir. 1977), cert. denied, 435 U.S. 981 (1978), in which the university was required to extend recognition to a group of students seeking to associate to advocate liberalization of legal restrictions against homosexuals and generate understanding and acceptance of homosexuals.

37. "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom..."

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. There can be no doubt that denial of official recognition, without justification,

to college organizations burdens or abridges that associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes. The practical effect of nonrecognition was demonstrated in this case when, several days after the President's decision was announced, petitioners were not allowed to hold a meeting in the campus coffee shop because they were not an approved group."

38. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

39. Shelton v. Tucker, 364 U.S. 479 (1960); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

40. Abington School District v. Schempp, 374 U.S. 203, 247 (1963).

41. Pfeffer,"The Supremacy of Free Exercise,"61 Georgetown Law Journal 1115 (1973); Swartz,"No Imposition of Religion: The Establishment Clause," 77 Yale Law Journal 692 (1968).

42. Keegan,note 17 supra at 17.

43. Johnson,note 23 supra at 48.

44. Title IX of the Education Amendments of 1972: A Proposed Policy Interpretation, 43 Fed. Reg. 58070-76 (Dec. 11, 1978).

45. The crucial consideration is not what the statute says but what the administrators do. The safeguards that count are the ones the administrators use, not the ones mentioned in the statute. The standards that matter are the ones that guide the administrative determination, not merely the ones stated by the legislative body. The test should accordingly be administrative safeguards and standards, not statutory safeguards and standards. Kenneth Culp Davis, Administrative Law Text, 3d ed. (St. Paul, Minn.: West Publishing Co., 1972) p. 44.

46. Abington School District, note 40 supra at 225.

47. 20 U.S.C. §1132e(b).

FOOTNOTES TO CHAPTER FIVE

1. Section 504 of the Rehabilitation Act of 1973 provides: "No otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." P.L. 93-112, 87 Stat. 361, 29 U.S.C. 794. On April 28, 1976 President Ford issued Executive Order 11914 to implement the provisions of section 504. After a federal district judge had entered an order compelling the Secretary of HEW to promulgate regulations in this area, Cherry v. Matthews, 419 F. Supp. 922 (D.D.C. 1976),and after Secretary Califano had been picketed at his office and his residence by handicapped persons who charged that the Carter Administration was unresponsive to their demands, HEW issued on May 4, 1977 lengthy regulations on "Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance." 45 C.F.R. Part 84. The pertinent provision of the Act of Congress occupies four lines in the statute book. The administrative regulations occupy thirty-three pages in the Code of Federal Regulations. The verbosity and excessive detail of federal regulations has been noted often and need not be called to the attention of the Sloan Commission save perhaps for the enjoyment they might derive from the following cartoon:

2. Remarks of Claire Guthrie, First Annual Conference on Legal Problems in Independent Higher Education, sponsored by the Center for Constitutional Studies, Notre Dame, In., Oct. 17, 1978.

3. Variable 127, Center Survey.

4. Response #42 to variable 113, Center Survey.

5. Response #38 to variable 113, Center Survey.

6. Response #21 to variable 113, Center Survey.

7. Response #85 to variable 113, Center Survey.

8. Assurance of Compliance filed with HEW by college, anonymity of which must be preserved. Copy on file in Center for Constitutional Studies.

9. Letter of Aug. 22, 1977 from college president to David S. Tatel, Director, OCR. Copy on file in Center for Constitutional Studies.

10. Letter of Sept. 30, 1977 from college president to Tatel. Copy on file in Center for Constitutional Studies.

11. Letter of Nov. 1977 from college president to friends and supporters of the college. Copy on file in Center for Constitutional Studies.

12. Letter of May 25, 1978 from John Wodatch, Chief, Handicapped Discrimination Branch, Office of the Secretary, HEW, to college president. Copy on file in Center for Constitutional Studies.

13. Id.

14. Pub. L. 66-236, 41 Stat. 735 (1920).

15. Pub. L. 78-113, 57 Stat. 374 (1943).

16. Pub. L. 83-565, 68 Stat. 652 (1954).

17. Pub. L. 89-333, 79 Stat. 1282 (1965); Pub. L. 91-610, 84 Stat. 1817 (1970).

18. Hearings on H.R. 9847, H.R. 12742, H.R. 7949, H.R. 7526, and H.R. 12644, before the Select Subcomm. on Education of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972); Hearings on H.R. 8395, S. 3368, S. 3158, S. 1030, S. 41 and S. 2812, before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972).

19. House Conf. Rep. No. 1581, 92d Cong., 2d Sess. (1972) on the Rehabilitation Act of 1972; see also S. Rept. No. 318, 93d Cong., 1st Sess. (1973).

20. H.R. 8395, 92d Cong., 2d Sess. (1972), and S. 7, 93d Cong., 1st Sess. (1973).

21. See Memorandum of Disapproval, Oct. 27, 1972, in Weekly Compilation of Presidential Documents (Oct. 30, 1972), p. 1579; and Veto Message of Mar. 27, 1973, in Weekly Compilation of Presidential Documents (Apr. 2, 1973), pp. 302-03.

22. Pub. L. 93-112, 87 Stat. 355, 29 U.S.C. 701-794. For the legislative history of the Act, see 1973 U.S., Code Cong. and Ad. News 2076.

23. Pub. L. 88-352, Title VI, §601, 78 Stat. 252, 42 U.S.C. 2000d (banning discrimination on the basis of race, color, or national origin in federally assisted programs).

24. Pub. L. 92-318, Title IX, §901, 86 Stat. 373, 20 U.S.C. 1681 (banning discrimination on the basis of sex in federally assisted programs).

25. Pub. L. 93-112, Title V, §504, 87 Stat. 355, 29 U.S.C. 794.

26. Publ L. 93-112, §6, 87 Stat. 361, 29 U.S.C. 706(6).

27. Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1617. For the legislative history of these amendments, see 1974 U.S. Code Cong. and Ad. News 6373.

28. S. Rep. No. 1297, 93 Cong., 2d Sess. (1974), as cited in 1974 U.S. Code Cong. and Ad. News at 6388.

29. "The Senate Report on the 1973 Act does not discuss the problem of alcohol and drug addiction. See S. Rept. No. 93-318, 93d Cong., 1st Sess. (1973). However, during the course of the hearings which led to enactment of the Rehabilitation Act of 1973, the Senate Committee was made aware of the fact that the Department of Health, Education, and Welfare had classified alcoholics and drug addicts as handicapped individuals and was providing for their treatment under the Vocational Rehabilitation Act. Rehabilitation Act of 1972, Hearings before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 92d Cong.,2d Sess. 147-50 (1972); HEW, Vocational Rehabilitation Administration Vocational Rehabilitation Manual (1967), reprinted in id. at 153, 165; id. at 297. While it does not appear that the Senate gave any particular consideration to the specific problems of alcoholics and drug addicts, the Senate gave no indication that it disagreed with the position expressed in the House Report that such persons could qualify as "handicapped individuals" under the 1973 Act and its predecessor. In this connection, reenactment of statutory language that has been given a particular administrative construction is ordinarily thought to lend that construction additional support. See. e.g., Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 410 (1975)." 43 Op. Atty. Gen. of U.S. No. 12, April 12, 1977, at p. 5.

30. Id. at 10.

31. Ibid.

32. Id. at 11.

33. Ibid.

34. 45 CFR 84.53.

35. In the section by section analysis appended to the regulations, there is a notation to the effect that "The Secretary...has obtained a legal opinion from the Attorney General.... The Secretary therefore believes that he is without authority to exclude these conditions [alcoholism and drug addiction] from the definition." 45 CFR, Part 84, at p. 376 (emphasis supplied).

36. Ibid.

37. "No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be...subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794.

38. 45 CFR, Part 84 at p. 376 (emphasis supplied).

39. Id.

40. See, e.g., the Gospel according to Luke, 7:37; 15:7; 18:13; 19:7.

41. Declaration of Independence, 1 Stat. 1 (1776); cf. Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual to punish drug addicts); but see Powell v. Texas, 392 U.S. 514 (1968) (not cruel or unusual to punish public drunks).

42. Center Survey, responses #84, 108, and 127 to variable 127.

43. See, e.g., David Rothman, The Discovery of the Asylum: Social Orders and Disorders in the New Republic (Boston: Little Brown, 1971).

FOOTNOTES TO CHAPTER SIX

1. Response #144 to variable 120, Center Survey.

2. Responses #42 and 122 to variable 103, Center Survey.

3. Response #41 to variable 103, Center Survey.

4. Response #17 to variable 120, Center Survey.

5. Response #41 to variable 120, Center Survey.

6. Response #122 to variable 120, Center Survey.

7. Response #181 to variable 120, Center Survey. The IRS is currently conducting a major review of tuition remission programs. See, e.g., the letter of April 28, 1978 from Sheldon E. Steinbach, Staff Counsel, American Council on Education, to Jerome Kurtz, Commissioner, Internal Revenue Service, as cited in Notre Dame Report, Vol. 7, No. 19 (June 23, 1978), pp. 466-68.

8. Unless otherwise noted, citations to the Internal Revenue Code are from the version of the Code current at the writing of this study (January, 1979) and will not be documented in footnotes.

9. John Brooks, "The Marts of Trade: The Law School and the Noodle Factory," New Yorker, Vol. 53 (Dec. 26, 1977) pp. 48-53.

10. See C.F. Mueller Co. v. Commissioner IRS, 14 T.C. 922 (1950), rev'd, 190 F. 2d 120 (3d Cir. 1951); but see De La Salle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961).

11. Charles M. Whelan, S.J., "Planning for Unrelated Business Income Tax Problems." Remarks at First Annual Conference on Legal Problems in Independent Higher Education, Notre Dame, IN, Oct. 17, 1978, p. 4 (footnotes renumbered).

12. See the remarks of Rep. Lynch, floor-manager of the Revenue Act of 1950, in 96 Cong. Rec. 9364-69 (1950).

13. There is some, but not overwhelming justification in the legislative history of the Revenue Act of 1950 for Treasury's view that this purpose was the "primary objective" of the adoption of the unrelated business income tax. Treas. Reg. § 1.513-1(b) (1975).

14. See Senate Report No. 2375, 81st Cong., 2d Sess., 1950-2 Cum. Bull. 504-5. In the text of his remarks, Fr. Whelan noted that before 1950 the courts were in conflict over the tax-exempt status of organizations which conducted both exempt and non-exempt activities. The IRS and some courts construed the requirement of section 501(c)(3), that an exempt educational organization,

must be operated "exclusively" for exempt purposes, to mean that such an organization would lose its tax-exempt status if it engaged in a non-exempt trade or business. Most courts, however, rejected this position, and in 1950 Congress sustained the majority view by stating that an exempt organization would not lose its exempt status by engaging in non-exempt business but that it would thereafter have to pay income taxes on the profits derived from such business. See Whelan, note 3 supra, at p. 5.

15. Charles M. Whelan, S.J., "Government and the Church," America, Vol. 139, No. 20 (Dec. 16, 1978), p. 450; see also "Government Regulations and Tax Exemption," Origins (NC Documentary Service), Vol. 8, No. 24 (Nov. 30, 1978), p. 382.

16. If they did not, there may be a difficulty in asserting a constitutional justification for treating church related school's unrelated business income differently from that of other exempt institutions. See Walz v. Tax Commission, 397 U.S. 664 (1970), and see Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972) (remanded for consideration of change in state law denying exemption for purely commercial property and requiring a pro rata exemption for mixed use).

17. For a comprehensive treatment of the subject, see Stanley Weithorn, Tax Techniques for Foundations and Other Exempt Organizations, (New York: Matthew Bender Co., 1975 with annual supplements), and Bruce R. Hopkins, The Law of Tax-Exempt Organizations, Washington: Lerner Law Book Co., 2d ed. (1977).

18. 195 F. Supp 891 (N.D. Cal. 1961).

19. Id. at 898-99.

20. 500 F. 2d 508 (Ct. Cl. 1974).

21. IRS Technical Advice Memorandum, as reported in Higher Education and National Affairs, Vol. 27, No. 40, (Oct. 13, 1978), p. 3.

22. Charles M. Whelan, S.J., "The Cistercian Unrelated Business Income Tax Ruling," Law Briefs: Church-State Trends of Note in Government, No. 13 (Oct. 1979), pp. 5-10.

23. According to Fr. Whelan, "[t]he general purpose of these rulings has been to prevent exploitation of earlier rulings in these areas by organizations like the Universal Life Church (the mail-order ordination outfit based in California)....

Traditionally, most members of Catholic religious orders have worked in Catholic institutions. The few that worked outside Catholic institutions were of little concern to IRS until some non-Catholic religious orders tried to support themselves, tax-free, by deploying their members in secular employment. By holding that a member of a religious order is personally taxable if he works outside the church to which his order

belongs, IRS has shut one avenue that certain non-Catholic religious orders (or communes) were exploring in their quest for a tax-free existence....

By holding that the 'self-support by manual labor' component of the Cistercian Rule did not make all the Cistercian trades and businesses 'substantially related,' IRS has terminated any tax incentive for the adoption of a similar rule by a commune bent on avoiding federal income taxes." Art. cit., pp. 8, 9.

24. Id., pp. 7-8.

25. Id., p. 6.

26. Such sacramental use of wine was carefully exempted from the noble experiment of prohibition, for the 18th amendment banned the manufacture, sale and transportation of intoxicating liquors only if they were to be consumed "for beverage purposes." U.S. Con., Am. XVIII, § 1.

27. This appears to be one of the predicates underlying the assertion of federal jurisdiction by Congress to mandate the equal access of women to collegiate athletic programs under Title IX of the Education Amendments of 1972, Pub. L. 92-318, Title IX, § 901, 86 Stat. 373, 20 U.S.C. 1681.

28. IRS Technical Advice Memorandum, Aug. 31, 1978 (Significant Index No.: 512.00); see Wall Street Journal, Oct. 4, 1978; Chronicle of Higher Education, Sept. 25, 1978, p. 13; Higher Education and National Affairs, Vol. XXVII, No. 36, Sept. 15, 1978, p. 3.

29. IRS Technical Advice Memorandum, as cited in note 21, supra.

30. Rev. Rul. 74-399.

31. See note 21, supra.

32. I.R.C. §6033(a) (pre-1969); this section was amended by §101 (d)(1) of Pub. L. 91-172, 83 Stat. 487.

33. 2 Prentice-Hall Tax Exempt Organizations ¶23,001(1979) (emphasis added).

34. Rev. Reg. 1.6033-2(g)(5).

35. Id.

36. Id.

37. Id.

38. I.R.B. 1977-42, 39, 779 CCH ¶6931 N.

39. Id.

40. Id.

41. See Whelan, art. cit., note 15, supra.

42. Ibid.

43. This conclusion is drawn from the response to question 23, variable 132 of the Center Survey. 47.6% of the respondents to this question disagreed with the notion that a college ought not to be eliminated from entitlement to receipt of a public benefit on the grounds that it practices racial or gender-based discrimination, provided that such a policy were dictated by the authoritative teaching of the church to which the college is related. 38.3% of the respondents agreed with the statement; and 9.8% expressed no opinion. As several respondents observed, however, the form of the question was cumbersome and misleading. In any event, these data should not be construed as evidence that many religiously affiliated colleges maintain a policy of racial or gender-based discrimination. A positive response to this question indicates not institutional practice but merely the opinion that if a particular religious group maintains a religious conviction in this area it ought not to be jeopardized for conforming its practice to that belief.

The authors of this study do not know which, if any, religiously oriented colleges maintain a practice or policy of racial discrimination. To the best of our knowledge, the only institution of this sort whose exempt status has been litigated is Bob Jones University in Greeneville, South Carolina. In July, 1970, the IRS publicly announced that it would no longer allow tax exempt status to private schools that practice racial discrimination or allow deductibility of charitable donations to such schools. On November 30, 1970, the Service formally notified the university that it would challenge the tax exempt status of such schools. The university was unsuccessful in attempts to procure an assurance of continued exempt status through the administrative process. And in September, 1971, the university sought injunctive relief to prevent the Service from revoking the exempt status of the university. The district court was persuaded by the reasoning of the three-judge panel in Green v. Connally, see note 47 infra, and denied the injunction. Bob Jones University v. Simon, 396 F. Supp. 597 D.S.C. (1974). The Supreme Court ruled that section 7421(a) of the Internal Revenue Code bars a taxpayer from obtaining judicial review by way of injunctive action before the assessment or collection of any tax. Bob Jones University v. Simon, 416 U.S. 725 (1974).

Taking the generous hint dropped by the Supreme Court that a taxpayer might obtain judicial relief by paying an installment of federal social security or unemployment taxes, exhausting administrative remedies, and then suing for a refund, 416 U.S. at 746, the university paid federal unemployment tax totalling $21 on one employee for the calendar year of 1975. It was, therefore, in position to commence litigation again when the IRS officially revoked the exempt status of the university on January 19, 1976, announcing that this decision was retroactive to December 1, 1970. The federal district court recently overturned the Service's revocation, ruling both that the IRS has unconstitutionally abridged the university's free exercise

rights, and that its interpretation of the meaning of section 501(c)(3) of the Internal Revenue Code, as promulgated in the revenue rulings and procedures mentioned in the text, could not be sustained. Bob Jones University v. United States of America, ___ F. Supp. ___ (D.S.C. Civ. Action No. 76-755, decided Dec. 26, 1978).

The government has filed an appeal from this judgment and decision to the Fourth Circuit Court of Appeals. That circuit recently affirmed summarily the order of a district court upholding a decision of the Veterans' Administration to terminate GI benefits to students attending the university. The district court sustained this termination on the basis that this form of student assistance constituted a "federally funded program" within the meaning of Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, §601, 78 Stat. 252, 42 U.S.C.2000d. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C.), aff'd. per curiam, 529 F. 2d 514 (4th Cir. 1975). And see McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (tax deduction viewed as grant of federal financial assistance within scope of Title VI).

44. Rev. Rul. 75-231, 1975-1 C.B. 158.

45. 43 F.R. 37296-98 (Aug. 22, 1978).

46. 403 U.S. 661, 671, n.2 (1971) (White, J., concurring).

47. 404 U.S. 997 (1971), summarily affirming Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971); see also Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).

48. 413 U.S. 455 (1973).

49. Rev. Rul. 71-447, 1971-2 C.B. 230.

50. Rev. Proc. 72-54, 1972-2 C.B. 834.

51. Rev. Proc. 75-50, 1975-2 C.B. 587.

52. Id.

53. Rev. Rul. 75-231, 1975-1 C.B. 158.

54. 427 U.S. 160 (1976).

55. Act of Apr. 9, 1866, Ch. 31, ¶1, 14, Stat. 27, 42 U.S.C. 1981.

57. Brown v. Dade Christian Schools, 556 F. 2d 310 (5th Cir. 1977), cert. denied, 98 S. Ct. 1235 (1978).

58. 43 F.R. 37,296 (Aug. 22, 1978).

59. See, e.g., Testimony of the Hon. Thomas Eagleton (Dem.-Mo.); the Hon. Barry M. Goldwater, Jr. (Rep.-Ca.); George E. Reed, General Counsel, United States Catholic Conference; William B. Ball, Counsel, National Committee for Amish Religious Freedom; Lewis E. Streibeck, Jr., Counsel, The Lutheran Church-Missouri Synod; Robert Lamborn, Council for American Private Education; Thomas S. Neuberger, Counsel, Center for Law and Religious Freedom, Christian Legal Society; and Albert Meyer, Executive Secretary, Mennonite Board of Education. Hearings on Proposed Revenue Procedure on Private Schools, Dept. of the Treasury, Internal Revenue Service, Washington, D.C., Dec. 5-8, 1978.

60. Proposed Rev. Proc. on Private Tax-Exempt Schools, §4.01, 43 F.R. 37297-98.

61. Id., §4.02. According to the proposed revenue procedure, a "reviewable school" will be considered by the Service to have a racially discriminatory policy as to students until the school can demonstrate [that] actual enrollment of minority students such that the percentage of minority students enrolled in the school is at least 20 percent of the percentage of the minority school age population in the community.

62. Id., §4.02. The five criteria are:

1. Availability of and granting of scholarships or other financial assistance on a significant basis to minority students.
2. Active and vigorous minority recruitment programs, such as contacting prospective minority students and organizations from which prospective minority students could be identified.
3. An increasing percentage of minority student enrollment.
4. Employment of minority teachers or professional staff.
5. Other substantial evidence of good faith, including evidence of a combination of lesser activities, such as:
   (a) Continued and meaningful advertising programs beyond the requirements of Revenue Procedure 75-50, or contacts with minority leaders inviting applications from minority students.
   (b) Significant efforts to recruit minority teachers.
   (c) Participation with integrated schools in sports, music and other events or activities.
   (d) Making school facilities available to outside, integrated civic or charitable groups.
   (e) Special minority-oriented curriculum or orientation programs.
   (f) Minority participation in the founding of the school or current minority board members.

63. Id., §1.04.

64. Ibid.

65. Id., §1.05.

66. The list of such hoaxes and frauds extends from the biblical account of Simon Magus, Acts 13:6-12, through the Elmer Gantry's, to contemporary manifestations such as the mail-order ordination of the Universal Life Church, the questionable money-raising techniques of some media hucksters, the misappropriation of charitable donations by the provincial of the Pallotine Fathers in Baltimore, the unlawful conversion to diocesan use of over a million dollars donated ecumenically for a boy's home in California for children of all faiths, and the recent assasinations and mass suicide in Jonestown, Guyana, involving over 900 members of the People's Temple, a group with strong overtones of a religious cult.

67. "Not only should the question of religious truth or falsity and sincerity or hypocrisy of religious professions be beyond the cognizance of government, but even the very meaning or definition of 'religion,' as the term is used in the First Amendment, should be outside the area of governmental inquiry." Milton R. Konvitz, Religious Liberty and Conscience: A Constitutional Inquiry (New York: Viking Press, 1968), p. 50.

68. See Charles M. Whelan, S.J., "Definitional Problems in the Internal Revenue Code," in John W. Baker, ed., Taxation and the Free Exercise of Religion (Washington, D.C.: Baptist Joint Committee on Public Affairs, 1978) pp. 19-24; see also Whelan, "'Church' in the Internal Revenue Code: The Definitional Problems," 45 Fordham L. Rev. 885 (1977).

69. The current Commissioner, Jerome Kurtz, is aware of this need for sensitivity. In a recent speech in New York he stated: "Of all the interpretative judgments the Internal Revenue Service must make in administering the tax laws, probably none is more difficult and none demands more sensitivity than those concerning tax consequences affected by questions of religion and civil rights...." Speech at Practicing Law Institute Conference, New York, Jan. 9, 1978, as cited in Daily Tax Report, Jan. 11, 1978, p. J-9, 2.

70. See Reorganization Plan No. 1 of 1978, Message from the President of the United States, House Doc. No. 95-295, 95th Cong., 2d Sess. (Feb. 23, 1978).

71. See, e.g., Alvin D. Lurie, "An Integrated Auxiliary Is Not a Church," in Baker, ed., op. cit., note 68, supra, pp. 15-17.

72. As Fr. Whelan has noted, these phrases have "no history whatsoever in American law or American history." He charges that the phrases were drafted "in great haste and without sufficient attention to the complicated and diverse legal structures of American churches." Art. cit., note 15, supra, p. 383; see also note 68, supra.

73. See Lurie, art. cit., note 72, supra.

74. "Congress could say, if it chose, that certain types of exempt organizations, whether or not religiously affiliated, motivated or controlled, have to file annual financial reports with the IRS." Whelan, art. cit., note 15, supra, p. 383.

75. Ibid.

FOOTNOTES TO CHAPTER SEVEN

1. Center Survey, response #85 to variable #110.

2. See, e.g., Unionism in Catholic Schools: A Symposium (Washington, D.C.: National Catholic Educational Association, 1976).

3. Center Survey, response #6 to variable #111.

4. Edward P. Kelley and Frank C. Gerry, "Bargaining Unit Placement of Religious Faculty," (Washington, D.C.: Academic Collective Bargaining Information Service, Nov. 1978) Special Report #35, p. 3.

5. Pub. L. 91-576, 84 Stat. 1598, 29 U.S.C. 657 et seq.

6. Center Survey, response #67 to variable #112.

7. Id., response #41 to variable #112; see also response #183 to variable #122, where the respondent complained of "duplicative paper work" and asserted that "ERISA [the Employment Retirement Income Security Act] is nightmarish."

8. 436 U.S. 307, 98 S.Ct. 1816 (1978).

9. Center Survey, response #42 to variable #112.

10. Id., response #85 to variable #112.

11. Trustees of Columbia University, 29 LRRM 1098 (1951).

12. Cornell University, 183 N.L.R.B. 329, 331 and 333, 74 LRRM 1269, 1275 (1970)

13. 35 Fed. Reg. 18370 (Dec. 3, 1970); 29 CFR 103.1. 163 respondents (87.9%) to the Center Survey reported an annual budget in excess of $1 million.

14. N.L.R.A. §§9(c)(1); 10(a); 29 U.S.C. §§159(c)(1), 160(a).

15. See, e.g., Iron Workers, Local 577 (Tri-State Steel Erectors), 199 N.L.R.B. 37 n.1, 81 L.R.R.M. 1275 (1972), and cases cited therein.

16. See, e.g., Seattle Real Estate Board, 130 N.L.R.B. 608, 47 L.R.R.M. 1348 (1961).

17. Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186 (1975) (firm engaged in entirely intrastate sales of asphaltic sales not reached by Robinson-Patman or Clayton Acts, even though sales were made for use in interstate highways).

18. NLRB v. Wentworth Institute, 515 F. 2d 550 (1st Cir. 1975).

19. Id. at 553-56.

20. See, e.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); and see Kahn, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication," 21 U.C.L.A. L. Rev. 63 (1973).

21. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974), and SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

22. 515 F. 2d at 556.

23. "We do not take Wentworth's views lightly, and were we a legislature we might reach a different result. But we are unable to convince ourselves that all faculties of all private non-profit institutions of higher learning in the nation are so situated as to fall outside the ranks of 'employees' under the [National Labor Relations] Act. Given wide differences in terms of service and responsibility, the focus must be upon each particular institution." Id. at 556. See also at 557: "On the record in this case...." And see at 558: "[W]e do [not] suggest that faculty members with different relationships and status than those herein are necessarily included employees under the Act."

24. Id. at 556-557.

25. NLRB v. Yeshiva University, 582 F. 2d 686 (2d Cir. 1978) reported in Chron. of Higher Ed., Vol. 16 (Aug. 14, 1979), p. 5, reversing Yeshiva University, 231 N.L.R.B. No. 98 (1977), 96 LRRM 1601.

26. "Whatever the situation may be in other institutions, the record here establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees. On the contrary, the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute the essence of the University's educational venture. We cannot conclude that the full-time faculty here has acted in its own interest...."

"Of course, it may well be that at other institutions the Board of Trustees have in fact regularly reviewed and rejected faculty recommendations, but this is not the case at Yeshiva." 582 F. 2d at 701, 702; Chronicle at p. 8.

27. Petition for cert. filed sub nom. Yeshiva Univ. Faculty Assn. v. Yeshiva Univ. (#78-997) 47 L.W. 3514 (Dec. 19, 1978).

28. Ibid.

29. As is often the case, the legislative history is open to conflicting interpretations. Representative Hartley's version of the 1947 amendments to the NLRA contained a provision exempting nonprofit educational institutions from coverage under the Act. H.R. 3020, reprinted in H.R. Rept. No. 245, 80th Cong., 1st Sess. 47 (1947). Senator Taft's version contained no such exemption, but the full Senate accepted an amendment excluding nonprofit hospitals. The conference committee retained this exemption for nonprofit hospitals, but

omitted any express exemption of any other nonprofit institution, explaining its action as follows: "The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947), reprinted in U.S. Code Cong. Serv. 1947 at 1137. For a discussion of this provision of the conference report, see Sherman and Black, "The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Doctrine," 83 Harv. L. Rev. 1323, 1331-37 (1970), and see 515 F. 2d at 554-55.

10. Cert. granted, 434 U.S. 1061, 98 S.Ct. 1231 (1979). The petitioner (NLRB) has been supported with amicus briefs filed by the AFL-CIO and by the American Federation of Teachers. The respondents have been supported with amicus briefs filed by the United States Catholic Conference, Catholic High Schools in the Archdiocese of Los Angeles and the Diocese of Orange, the Baptist Joint Committee on Public Affairs, the General Conference of Seventh-Day Adventists, the Center for Law and Religious Freedom of the Christian Legal Society, and the Roger Baldwin Foundation of the ACLU.

The Solicitor General has argued on behalf of the NLRB that subjecting the religious employers involved here to the Board's jurisidction would not require them to take any action inconsistent with their religious beliefs, (Brief for Petitioner, pp. 25-35) that the Board's jurisdiction over these employers is justified by the "compelling state interest" of extending the protection of the N.L.R.A. to the "large number of lay teachers employed in parochial schools" (id., p. 36), and that such jurisdiction does not involve the government in "excessive entanglement" with the religious administration of the schools in question (id., pp. 41-46).

Respondents have concentrated their arguments on the "impermissible entanglement" theme, arguing that the adjudication of church-teacher disputes would inevitably entangle the Board in religious matters (Brief for Respondents, pp. 23-28), that board certification and orders to bargain interfere with the bishops' authority to manage their [sic] schools under church law (id., pp. 29-34), that no interest at all, let alone a compelling interest, can be asserted to justify the Board's "intrusion" into private religious schools, and that Congress never intended the N.L.R.A. to apply to religious educational institutions (id., pp. 39-42).

11. The Board has declined to exercise its jurisdiction over "institutions primarily religious and non-commercial in character and purpose, whose educational endeavors are limited essentially to furthering and nuturing their religious beliefs." Board of Jewish Educ. of Greater Washington, D.C., 210 N.L.R.B. 1037 (1974); see also Ass'n. of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974) (but see opinion of Board Member [now Chairman] Fanning, dissenting).

32. "Neither the Act nor the United States Constitution declares that lay teachers must surrender Sec. 7 rights [to organize and to bargain collectively] if they become employed by a religious institution." Henry M. Hald High School Ass'n., The Sisters of St. Joseph, 213 N.L.R.B. 415, 417 n. 7 (1974). See also, Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975) Roman Catholic Archdiocese of Newark, 204 N.L.R.B. 159 (1973); Roman Catholic Archdiocese of Los Angeles, 223 N.L.R.B. 1218 (1976) (appeal filed in 9th Cir.); and Archdiocese of Philadelph[illegible], 227 N.L.R.B. No. 177 (1977). See Comment, "The Free Exercise Cla[illegible] the NLRA, and Parochial School Teachers," 126 U.Pa. L.Rev. 631 (1978).

33. Catholic Bishop of Chicago v. NLRB, 559 F. 2d 1112, 1120 (7th Cir. 1977). See Laycock, "Civil Rights and Civil Liberties," 54 Chicago-Kent L. Rev. 390, 415-35 (1978), and Comment, 53 Notre Dame Law. 463 (1978).

34. 559 F. 2d at 1124, 1131.

35. See, e.g., New York v. Cathedral Academy, 434 U.S. 125 (1977); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. PEARL, 413 U.S. 472 (1973); PEARL v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); and Lemon v. Kurtzman, 403 U.S. 603 (1971).

36. See Roemer v. Maryland Bd. of Public Works, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); and Tilton v. Richardson, 403 U.S. 672 (1971). See also, Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn) aff'd., 98 S. Ct. 39 (1977), and Smith v. Bd. of Governors of Univ. of N. Carolina, 429 F. Supp. 871 (W.D. N.C.) aff'd., 98 S. Ct. 39 (1977). See Editorial, "Free Choice for College Students," America, Vol.37 (Oct. 22, 1977), p. 257.

37. Section 9(b) of the NLRA, 29 U.S.C. 159(b) directs the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...." See also 29 U.S.C. 153(b).

38. Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947); see South Prairie Construction Co. v. Operating Engineers, 425 U.S. 800, 805 (1976); Szabo Food Services, Inc. v. NLRB, 550 F. 2d 705 (2d Cir. 1976); Atlas Hotels, Inc. v. NLRB, 519 F. 2d 1330 (9th Cir. 1975).

39. Fordham University, 193 N.L.R.B. 134 , 78 L.R.R.M. 1177 (1971).

40. Seton Hill College, 201 N.L.R.B. 1026, 82 L.R.R.M. 1434 (1973). Although Fordham was not reversed outright, Seton Hill now states the current thinking of the Board, to the extent that there is any inconsistency between the cases. 201 N.L.R.B. at 1027, n. 4.

41. The faculty at this institution numbered 95 in 1973 and was comprised as follows: 58 members of the sponsoring religious order, 1 nun from another order, 2 priests, and 34 lay persons.

42. Kelley and Gerry, note 4 supra, p. 6.

43. D'Youville College, 225 N.L.R.B. 792 , 92 L.R.R.M. 1578 (1976) (reversing the determination of the Regional Director to exclude the religious faculty from the bargaining unit).

44. Kelley and Gerry, note 4 supra, p. 6.

45. Niagra University, 226 N.L.R.B. 918 , 94 L.R.R.M. 1001 (1976).

46. "The obligations under the vow of obedience are concerned with matters of religion and not with the individual's professional conduct as a professor, or with their activities with respect to labor or other professional organizations." (4 L.R.R.M. at 1002.

47. Id. at 1003.

48. Kelley and Gerry, note 4 supra, p. 9.

49. Niagra University v. NLRB, 558 F. 2d 1116 (2d Cir. 1977). But see Nazareth Regional High School v. NLRB, 549 F. 2d 873 (2d Cir. 1977) (affirming the Board's exclusion of religious faculty where they were paid "substantially less" than the lay faculty).

50. See Jordan Hite, "Religious Vows and the NLRB" Review for Religious 37 (1978) 920-34.

51. Kelley and Gerry, note 4 supra, p. 10.

52. St. Francis College, 224 N.L.R.B. 907 , 92 L.R.R.M. 1551 (1976).

53. "At the outset we note that we are not here concerned with a first amendment problem, or with religious discrimination. The Board's exclusion of the Franciscans was based solely on grounds having nothing to do with religion." St. Francis College v. NLRB, 562 F. 2d, 246, 252 (3d Cir. 1977).

54. Id. at

55. Id. at 252, citing Memorial Hospital v. NLRB, 545 F. 2d 351, 357 (3d Cir. 1976).

56. 562 F. 2d at 250.

57. Id. at 249, citing R. Gorman, Labor Law: Unionization and Collective Bargaining 69 (1976); see also 562 F. 2d at 256 (Rosenn, J., concurring).

58. Id. at 257.

59. Id. at 249, n. 5, citing Packard Motor Car Co. v. NLRB, 330 U.S. 485, 491 (1947).

60. See note 20, supra.

FOOTNOTES TO CHAPTER EIGHT

1. Center Survey, response #67 to variable 108.

2. Center Survey, response #41 to variable 108. The kinds of discrimination specified in section 804 of the Act include: refusal to sell after a bona fide offer has been made; refusal to negotiate for sale or rental; making a dwelling unavailable; discriminating in the terms, conditions, or privileges of sale or rental of a dwelling; publishing a statement or notice indicating a preference, limitation, or discrimination based on race, color, religion, or national origin; making a false representation that a dwelling is not available for inspection, sale, or rental; and "blockbusting" or inducing, for profit, a person to sell or rent a dwelling by representations regarding the entry into the neighborhood of a person of a particular race, color, religion, or national origin.

3. Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, P.L. 90-284, 82 Stat. 81, as amended by P.L. 93-383, 88 Stat. 729, codified at 42 U.S.C. 3601-3619. For the legislative history of this Act, see 1968 U.S. Code Cong. and Admin. News 1837.

4. P.L. 90-284, 82 Stat. 83, 42 U.S.C. 3605. This section of the Act makes it unlawful for a bank, building and loan association, insurance company or other business enterprise engaging in the making of commercial real estate loans to deny a loan to a person or to discriminate against such a person in the terms or conditions of a loan because of the person's race, color, religion or national origin.

5. P.L. 90-284, 82 Stat. 84, 42 U.S.C. 3606. This section of the Act makes it unlawful to deny any person access to any multiple listing service, or to discriminate against any person in the terms or conditions of such access to services relating to the sale or rental of dwellings because of the person's race, color, religion, or national origin.

6. P.L. 90-284, 82 Stat. 84, 42 U.S.C. 3607. This exemption does not apply to restriction of church-owned property to members of the same religion if "membership in such religion is restricted on account of race, color, or national origin."

7. The word "sex" was added to sections 804, 805, and 806 of the 1968 Act. P.L. 93-383, 88 Stat. 729. For the legislative history of this Act see 1974 U.S. Code Cong. and Admin. News 4273. See also 45 CFR 86.32 (Title IX regulations concerning housing).

8. Section 807 of the Act also provides an exemption which allows a private club not open to the public to limit the rental or occupancy of its lodgings to its members or to give preference to its members. P.L. 90-284, 82 Stat. 84, 42 U.S.C. 3607.

9. It should be noted that in the only case decided under section 807 of the Act, the judge stated that the exemption for religious organizations is to be construed strictly, and would not apply to a children's home open to children of all creeds. United States v. Hughes Memorial Home, 396 F. Supp. 544 (N.D. Va. 1975).

10. See Sections 808-811 of the Act. P.L. 90-284, 82 Stat. 84-87, 42 U.S.C. 3608-3611.

11. P.L. 90-284, 82 Stat. 85, 42 U.S.C. 3610. To emphasize the importance of probing for agreement through such informal means, the Act specified that "Nothing said or done in the course of such informal endeavors may be made public or use as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned." Id.

12. P.L. 90-284, 82 Stat. 88, 42 U.S.C. 3613.

13. Letter from Drew S. Days, III and Frank E. Schwelb to Hal Visick, Feb. 28, 1978, as reprinted in 124 Cong. Rec. S4750 (daily ed. April 4, 1978).

14. Ibid.

15. Letter from Dallin H. Oaks to Drew S. Days, III, Mar. 14, 1978, as reprinted in 124 Cong. Rec. S4751 (daily ed. April 4, 1978).

16. "Since receiving your letter from a member of the press.... Your letter of February 28th was in the hands of the local media before we received it in the University." Ibid.

17. Ibid.

18. "When Separate is Equal," The New York Times, Mar. 27, 1978, p. A 26.

19. "Sex and the Single University," Los Angeles Times, Mar. 27, 1978, p. 6.

20. "Roommates: Equal Rights?," Boston Herald American, May 5, 1978.

21. George F. Will, "Government as Pest (Again)," Washington Post, Apr. 20, 1978, p. A27.

22. Agreement to Resolve Dispute [between Brigham Young University and the United States Department of Justice] June 8, 1978, p. 5.

23. Ibid.

24. Id. at p. 7.

25. Id. at p. 5.

26. Ibid.

27. Id. at p. 6.

28. Id. at p. 7.

29. James J. Kilpatrick, "Segregating the Sexes Off Campus," Washington Star, June 17, 1978, at p. A 11. See also the remarks of Senator Garn on S. Con. Res. 74, recognizing April as Fair Housing Month, 124 Cong. Rec. S4749-4750 (daily ed. April 4, 1978).

FOOTNOTES TO CHAPTER NINE

1. Pub. L. 88-352, 78 Stat. 253, 42 U.S.C. 2000e et seq.
2. Pub. L. 92-318, 86 Stat. 373, 20 U.S.C. 1681-1683.
3. Center Survey, response #67 to variable 106.
4. Id., response #40 to variable 107.
5. Id., response #14 to variable 107.
6. Id., response #183 to variables 106 and 107.
7. Id., response #111 to variable 106.
8. Id., response #41 to variable 106.
9. Id., response #41 to variable 107.
10. Id., response #38 to variable 107.
11. 20 U.S.C. 1681(a)(3).
12. 45 CFR 86.12.
13. Center Survey, variable 107.
15. Confidential correspondence between college president and David S. Tatel, Director, Office for Civil Rights, H.E.W., Jan. 6, 1978. The compliance form bore the further notation by the college president: "The College does not waive its legal position regarding the statutory and constitutional limits on HEW jurisdiction under Title IX."
16. Ibid.
17. 45 CFR, Part 86. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance.
18. Statement of Dallin H. Oaks, Sex Discrimination Regulations, Hearings before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, House of Representatives, 99th Cong., 1st Sess. (1975), at pp. 236-37.
19. The Federal Commission on Federal Paper Work estimated that in 1977 the cost of federal paper work was in excess of $100 billion, and in mild understatement concluded that "a substantial portion of this cost is unnecessary." Final Summary Report of Commission on Federal Paper Work (Washington, D.C.: Government Printing Office, 1977), p. 5.

20. For repudiations of such inquiry, see, e.g., Watson v. Jones, 13 Wall. (80 U.S.) 679 (1871), Gonzalez v. Roman Catholic Archbishop, 28 U.S. 1 (1929), Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960), Presbyterian Church in United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969), and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

21. 20. U.S.C. 1681(a)(3).

22. Hunt v. McNair, 413 U.S. 734, 743 (1973).

23. Brown v. Dade Christian Schools, 556 F. 2d 310 (5th Cir. 1977) 1235 (1978); see also Runyon v. McCrary, 427 U.S. 160, 167 (1976).

24. Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), Green v. Connally, 330 F. Supp. (150) (D.D.C), aff'd. sub nom. Coit v. Green, 404 U.S. 997 (1971).

25. Tilton v. Richardson, 403 U.S. 661, 671 n. 2 (White, J. concurring).

26. Norwood v. Harrison, 413 U.S. 455 (1973).

27. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1975) aff'd. per curiam, 529 F. 2d 514 (4th Cir. 1975).

28. This kind of argument lurks behind Justice Powell's opinion in San Antonio Indep. Sch. District v. Rodriguez, 411 U.S. 1 (1973) that the Equal Protection Clause does not require roughly equal funding of school districts created by the State of Texas. A similar argument by Justice Powell is found in Beal v. Doe, 432 U.S. 438, Maher v. Roe, 432 U.S. 464, and Poelker v. Doe, 432 U.S. 519 (1977), in which six Justices agreed that neither the constitution nor federal legislation compels public funding of medically unnecessary, nontherapeutic abortions for indigent women.

29. In the famous footnote 4 in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938), Justice Stone wrote that heightened judicial scrutiny might be appropriate in "the review of statutes directed at particular religious,...or national,...or racial minorities...." (Emphasis supplied).

30. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

31. See, e.g., Sherbert v. Verner, 374 U.S. 398, 403, 406-09 (1963).

32. See, e.g., Walz v. Tax Commission, 397 U.S. 664, 674-75 (1970).

33. 410 U.S. 179 (1973); the companion case was Roe v. Wade, 410 U.S. 113 (1973).

34. This clause was cited in Appendix A to Justice Blackmun's opinion in Doe. It reads:

> Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a hospital or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person. 410 U.S. at 205

35. 410 U.S. at 197-98 (emphasis supplied).

36. "The term 'affiliated' means either controlled by or associated with a church or with a convention or association of churches." Rev. Reg. 1.6033-2(g)(5)(emphasis added).

37. See, e.g., Note, "Title IX Sex Discrimination Regulations: Impact on Private Education," 65 Ky. L.J. 656 (1977); Janet Lammersen Kuhn, "Title IX: Employment and Athletics Are Outside HEW's Jurisdiction," 65 Geo. L.J. 49 (1976); and Comment, "HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges," 1976 Brigham Young U.L. Rev. 133. See also Grove City College v. Califano, (W.D. Pa., Civ. Action No. 78-1293, complaint filed Nov. 22, 1978).

38. 45 CFR 86.12.

39. See The Chronicle of Higher Education, Dec. 12, 1977, p. 2, col. 5.

40. In Brown II the Supreme Court noted that the issue at stake was "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis...." The Court remanded the five school desegregation cases before it to the lower courts, instructing them "to take such proceedi and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases...." Brown v. Bd. of Ed., 349 U.S. 294, 300, 301 (1955). Thirteen years later, after "massive resistance" statutes and "freedom of choice" plans had delayed the "prompt and reasonable start" called for in Brown II, the Court wrote tersely: "Such delays are no longer tolerable.... The burden on a school board today is to come forward with a plan that promises realistically to work, and promises

realistically to work now." Green v. County School Bd., 391 U.S. 430, 438, 439 (1968)(emphasis in original). HEW officials are fond of citing this text to school boards which manifest their opposition to desegregation through a policy of procrastination. If the standard applies to the regulated, it should apply to the regulator as well.

FOOTNOTES TO CHAPTER TEN

1. Center Survey (Seminaries) variable 69.

2. The outlay in the federal budget for fiscal year 1977 (Oct. 1, 1976 to Sept. 30, 1977) was $401,902,000,000. Economic Report of the President (Washington, D.C.: Government Printing Office, 1978), p. 339. The mean budget of siminary respondents was $1,023,000, and the median budget was $750,000. Center Survey, variable 9.

3. Id., variable 10.

4. Id., variables 13-21, 31-35.

5. Id., variables 22-30, 37-41.

6. Id., variable 9.

7. Id., variable 19.

8. Id., variable 28.

9. Id., variables 13-15, 31-32, 34-35.

10. Id., variables 22-24, 37-38, 40-41.

11. Id., variables 16-18.

12. Id., variables 25-27.

13. Id. One Roman Catholic seminary indicated that they experienced pressure from governmental officials to hire more women despite the fact that the Roman Catholic clergy is composed of male celibates. Response #111 to variables 104 and 106. Two seminaries complained generally about the regulations issued under the authority of the Vocational Rehabilitation Act. Responses #131 and 148 to variable 113.

14. Id. Responses #3, 111, 131 and 148 to variable 102. In contrast, eleven (6%) of the other colleges indicated difficulty with the Buckley Amendment.

15. Pub. L. 93-380, Title IV, §438, 88 Stat. 571, 20 U.S.C. 1232g.

16. Center Survey, response #111 to variable 102.

17. Id., response #131 to variable 102.

18. Id., response #148 to variable 102.

19. Id., response #3 to variable 102.

20. See the following subsections of 20 U.S.C. 1232g: (a)(1)(A); (a)(2); (b)(1); (b)(2); (e); and (f).

21. Center Survey, response #1 to variable 122.

22. Id., response #131 to variable 122. This respondent complained specifically about the Buckley Amendment.

23. Id., response #148 to variable 122. This respondent also complained specifically about the Buckley Amendment.

24. These provisions are codified in chapter 28 of Title 20 of the U.S.Code.

25. The phrase occurs in 20 U.S.C. 1011, 1027, 1045, 1056, 1132e-1 (1)(B)(iv), 1134b(c)(3), 1134f(c), 1134m(c), 1134q(c) and 1134s(e), and in 30 U.S.C. 1325. It is defined in 20 U.S.C. 1141(1) to mean "an institution or a department or a branch of an institution the program of instruction of which is designed for the education of students (A) to prepare them to become ministers of religion or to enter upon some other religious vocation (or to provide continuing training for any such vocation), or (B) to prepare them to teach theological subjects."

26. The statutes governing these programs are codified at 20 U.S.C. §§1001 to 1011. The prohibition against participation in any of these education programs, activities or services "by a school or department of divinity" is found in 20 U.S.C. 1011.

27. The Lifelong Learning Program is codified at 20 U.S.C. 1015 et seq. Participation in this program by a school or department of theology is prohibited by 20 U.S.C. 1011.

28. This program authorizes a basic grant for library purposes (exclusive of construction) and for library resources up to a maximum of $5,000 per fiscal year for each institution of higher education qualifying under the statute. 20 U.S.C. 1022. It authorizes supplemental grants for these purposes, up to an annual maximum of $20 for each full-time student enrolled in an eligible institution. 20 U.S.C. 1023. And it authorizes "special purpose grants" to eligible institutions which "demonstrate a special need for additional library resources." 20 U.S.C. 1024. 20 U.S.C. 1027 reads: "No grant may be made under this part for books, periodicals, documents, or other related materials to be used for sectarian instruction or religious worship, or primarily in connection with any part of the program of a school or department of divinity."

29. 20 U.S.C. 1041-1046.

30. 20 U.S.C. 1051-1056.

31. 20 U.S.C. 1121-1129(a).

32. 20 U.S.C. 1132a-1132a7.

33. 20 U.S.C. 1132b-1132b-1.

34. 20 U.S.C. 1132c-1132c5.

35. 20 U.S.C. 1134.

36. 20 U.S.C. 1134s.

37. 20 U.S.C. 1134d-1134h.

38. 20 U.S.C. 1134i-1134m.

39. 20 U.S.C. 1134n.

40. 20 U.S.C. 1134f.

41. 20 U.S.C. 1031.

42. 20 U.S.C. 1070e.

43. 20 U.S.C. 1101-1103.

44. 20 U.S.C. 1119-1119a.

45. 20 U.S.C. 1131.

46. 20 U.S.C. 1133.

47. 20 U.S.C. 1135a.

48. 20 U.S.C. 1136.

49. 20 U.S.C. 1070a.

50. 20 U.S.C. 1070b.

51. 20 U.S.C. 1070c.

52. 20 U.S.C. 1070d.

53. 20 U.S.C. 1071.

54. 20 U.S.C. 1087aa.

55. 20 U.S.C. 1087dd.

56. 20 U.S.C. 1134m.

57. 20 U.S.C. 1031.

58. 20 U.S.C. 1101-1103.

59. 20 U.S.C. 1119-1119a.

60. 20 U.S.C. 1131.

61. 20 U.S.C. 1133.

62. 20 U.S.C. 1135a.

63. 20 U.S.C. 1136.

64. 20 U.S.C. 1070e.

65. College Work Study Program Manual (Washington, D.C.: HEW, 1972) §305A, p. 3-6B.

66. "A member of a religious community, society, or order who by direction of the community, society, or order is pursuing a course of study in an institution or who receives support and maintenance from the community, society, or order is considered not to have financial need." 45 CFR 175.9(d), 43 Fed. Reg. 37932 (Aug. 24, 1978); see also 45 CFR 144.9(c), 43 Fed. Reg. 37910 (Aug. 24, 1978).

67. 392 U.S. 236 (1968).

68. 421 U.S. 349 (1975).

69. 433 U.S. 229 (1977).

70. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the benefit is to parents and children, not to schools." 392 U.S. at 243-44.

71. See, e.g., Meek v. Pittenger, 421 U.S. at 359-62; Wolman v. Walter, 433 U.S. at 236-38.

72. See, e.g., Abington School Dist. v. Schempp, 374 U.S. 203 (1963), and Engel v. Vitale, 370 U.S. 421 (1962).

73. See, e.g., Tuition Tax Relief Bills, Hearings before the subcommittee on Taxation and Debt Management Generally of the Committee on Finance, U.S. Senate, 95th Cong., 2d Sess. (1978), 105-179, 624-41.

74. American Jewish Congress, Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State, 19 vols. (1966-1976).

75. 1 Cranch (5 U.S.) 137 (1803).

76. Lamont v. Postmaster General, 381 U.S. 301 (1965); United States v. Robel, 389 U.S. 258 (1967); Schacht v. United States, 398 U.S. 58 (1970); Tilton v. Richardson, 403 U.S. 672 (1971); Blount v. Rizzi, 400 U. S. 410 (1971); and Chief of Capitol Police v. Jeanette Rankin Brigade, 409 U.S. 972 (1972).

77. See, e.g., Pub. L. 92-318, Title I, §111, 86 Stat. 238.

78. See, e.g., Pub. L. 92-318, Title VII, §704, 86 Stat. 355.

79. The Elementary and Secondary Education Act (ESEA) Pub. L. 81-874, 79 Stat. 27, 20 U.S.C. 241, has been litigated in Missouri, but without a conclusive determination of its constitutionality. Wheeler v. Barrera, 417 U.S. 402 (1974). A major trial involving this Act is to commence in the Southern District of New York in the spring of 1979. National Coalition for Public Education and Religious Liberty v. Califano, AJC, Litigation Docket, note 74 supra, p. 14.

80. This form of aid by the states of Pennsylvania and Ohio has been upheld by the Supreme Court in Meek, note 68, supra, and in Wolman, note 69, supra.

81. There is no content-based prohibition on the kind of library resources which may be purchased with federal assistance.

82. Tilton v. Richardson, 403 U.S. 672, 675 (1971).

83. S.C. Code Ann. §22-41.2(b) (Supp. 1971), as cited in Hunt v. McNair, 413 U.S. 734, 736-37 (1973) (emphasis supplied). It is significant that the underlined words do not occur in the federal statute, but it may be too much to infer that Justice Powell thinks that there is a significant difference between denominational and nondenominational or ecumenically oriented seminaries.

84. Md. Laws of 1972, c. 534, as cited in Roemer v. Maryland Public Works Bd., 426 U.S. 736, 740-41 (1976). This provision was added to the statute in the wake of the Supreme Court's decisions in Tilton, supra, and Lemon v. Kurtzman, 403 U.S. 602 (1971). Both the District Court and the Supreme Court in Roemer noted that the Maryland Council for Higher Education, which has primary responsibility for administering the program, has decided as part of its administrative powers to construe the act to mean that an institution is ineligible for this aid if it is one "awarding primarily theological or seminary degrees." 387 F. Supp. 1282, 1289, 1296 (D. Md. 1974); 426 U.S. at 741-42.

85. See, e.g., Calvary Bible Presbyterian Church of Seattle v. Univ. of Washington, 72 Wash. 912, 436 P. 2d 189, cert. denied, 393 U.S. 860 (1968).

86. Tilton v. Richardson, 403 U.S. at 686. Chief Justice Burger noted further that the theology requirement at the four Connecticut colleges in question could be fulfilled by successful participation in courses which "covered a range of human religious experiences...not limited to courses about the Roman Catholic religion." Id. at 686-87.

87. Id. at 687.

88. See, e.g., President's Commission on School Finance, Schools, People and Money: The Need for Educational Reform (Washington, D.C.: Government Printing Office, 1972); and see Statement of Andrew M. Greeley, National Opinion Research Center, in Tuition Tax Relief Bills, Hearings before the Subcommittee on Taxation of the Committee on Finance, U.S. Senate, 95th Cong., 2d Sess. 639 (1978).

89. See, e.g., Harold Berman, The Interaction of Law and Religion (Nashville: Abingdon, 1974).

90. For criticism of the Court's use of legal history in its adjudication of the religion clauses, see, e.g., remarks of Sen. Moynihan, 123 Cong. Rec. S15628 (daily ed. Sept. 26, 1977) (citing Storey, Seward, Spencer, Kent, Cooley and Corwin). And see Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978); Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1977); Frank J. Sorauf, The Wall of Separation: The Constitutional Politics of Church and State (Princeton: Princeton Univ. Press, 1976); Donald A. Manzullo, Neither Sacred Nor Profane: The Supreme Court and the Church (New York: Exposition Press, 1973); Richard E. Morgan, The Supreme Court and Religion (New York: Free Press, 1972); Mark DeWolfe Howe, The Garden and The Wilderness: Religion and Government in American Constitutional History (Chicago: Univ. of Chicago Press, 1965); and Paul G. Kauper, Religion and the Constitution (Baton Rouge: Louisiana State Univ. Press, 1964).

91. Dean M. Kelley, Why Churches Should Not Be Taxed (New York: Harper and Row, 1977).

92. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (authorizing the appeal by the state of the acquittal of a defendant in a state criminal prosecution).

93. Tilton v. Richardson, 403 U.S. 672, 687 (1971). Chief Justice Burger also wrote that "the necessity for intensive governmental surveillance is diminished and the resulting entanglements between government and religion lessened" by the fact that in the colleges involved "religious indoctrination is not a substantial purpose or activity." Ibid.

94. See, e.g., Wolman v. Walter, 433 U.S. 229, 256 (Brennan, J., dissenting); id. at 258 (Marshall, J., dissenting); id. at 266 (Stevens, J., dissenting).

95. See, e.g., Americans United for Separation of Church and State v. Blanton, 98 S. Ct. 39 (1977), and Smith v. Bd. of Governors of Univ. of N. Carolina, 98 S. Ct. 39 (1977). And see Editorial, "Free Choice for College Students," America 137 (Oct. 22, 1977), p. 257.

96. 45 CFR 175.9(d), 43 Fed. Reg. 37932 (Aug. 24, 1978).

97. Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding duration-of-relationship Social Security eligibility requirements for surviving wives and stepchildren of deceased wage earners).

98. 414 U.S. 632 (1974).

99. 413 U.S. 508 (1973).

100. 412 U.S. 441 (1973).

101. See, e.g., Note, "The Irrebuttable Presumption Doctrine in the Supreme Court," 87 Harv. L. Rev. 1534 (1974); and Note, "Irrebuttable Presumptions: An Illusory Analysis," 27 Stan. L. Rev. 449 (1975). For a more favorable treatment of this mode of analysis, see Tribe, "From Environmental Foundations to Constitutional Structures: Learning from Nature's Future," 84 Yale L.J. 545 (1975); and see Tribe, "Structural Due Process, 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 269 (1975).

102. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954) (invalidating racial segregation in public schools in the District of Columbia.

103. See Gerald Gunther, "The Supreme Court, 1971 Term; Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972); Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978), pp. 1082-97.

104. See generally Note, "Public Control of Private Sectarian Institutions Receiving Public Funds," 63 Mich. L. Rev. 142 (1964).

FOOTNOTES TO CHAPTER ELEVEN

1. Center Survey, variable 121 (adjusted frequency). Section 432 of the General Education Provisions Act of 1970, Pub. L. 91-230, 84 Stat. 164, 20 U.S.C. 1221, contains this prohibition.

2. Center Survey, variable 100 (adjusted frequency).

3. See, e.g., the comment of Kingman Brewster, former president of Yale: "High on the agenda of the [legal] profession, especially its scholarly branch, should be to see that in terms of both limits on authority and redress against its abuse, the coercive power of the federal purse is made subject to a rule of law." Yale Alumni Magazine (April 1975), pp. 34-35. See also Robert M. O'Neil, "God and Government at Yale: The Limits of Federal Regulation of AAUP Higher Education," 44 U. Cincinnati L. Rev. 525 (1975).

4. The text of this document is printed in American Association of University Professors, Policy Documents and Reports (Washington, D.C.: A.A.U.P., 1977), p. 1. The statement is also reprinted regularly in the professional magazine of the Association; see, e.g., AAUP Bulletin 64 (1978), 108.

5. See, e.g., "Marquette University" AAUP Bulletin 62 (1976), 83-94; "Concordia Seminary (Missouri)," id. 61 (1975), 49-59; "St. Mary's College (Minnesota)," id. 54 (1968), 37-42; "St. John's University (New York)," id. 52 (1966), 12-19; "Livingstone College," id. 43 (1957), 188-99.

6. For a discussion of this phenomenon, see W. Todd Furniss, "The Status of 'AAUP Policy,'" Ed. Record 59 (1978), 7-29, and Ralph S. Brown, Jr., and Matthew W. Finkin, "The Usefulness of AAUP Policy Statements," id. 30-44.

7. See, e.g., Tilton v. Richardson, 403 U.S. 672, 681-82 (1971).

8. See, e.g., Browzin v. Catholic University of America, 527 F. 2d 843 (D.C. Cir. 1975), noted in 62 Iowa L. Rev. 509 (1976).

9. See Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), pp. 611-16.

10. See, e.g., Tilton, note 7 supra, and cases cited in Emerson, note 9 supra, pp. 616-26.

11. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968).

12. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

13. Contrast, e.g., Adler v. Bd. of Education, 342 U.S. 495 (1952) (upholding the New York Feinberg Law and other loyalty regulations for teachers), with Wieman v. Updegraff, 344 U.S. 183 (1952) (invalidating as overbroad an Oklahoma loyalty oath challenged by faculty members at a state college). In Keyishian v. Bd. of Regents, 385 U.S. 589 (1967), the Court overturned Adler.

14. Contrast, Sweezy v. New Hampshire, 354 U.S. 234 (1957) (invalidating the conviction of a teacher at a state college who refused to testify to the State Attorney General about the contents of a lecture on socialism), with Barenblatt v. United States, 360 U.S. 109 (1959) (congressional power to investigate alleged Communist activities "is not to be denied solely because the field of education is involved").

15. Shelton v. Tucker, 364 U.S. 479 (1960).

16. 354 U.S. 234, 250 (1957); see also Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

17. Keyishian, note 16, supra, represents the situation of institutional intrusion of a professor's academic freedom. Sweezy, note 16, supra, is an example of corrosion of this freedom by one of the notorious red-baters of the 1950's, Louis Wyman. For a powerful autobiographical account of this period, see Lillian Hellman, Scoundrel Time (Boston: Little Brown, 1976).

18. 357 U.S. 449 (1958).

19. Alexis De Tocqueville, Democrary in America (New York: Knopf, 1945), Vol. 1, p. 196.

20. Mark De Wolfe Howe, "Foreword: Political Thoery and the Nature of Liberty," 67 Harv. L. Rev. 91 (1953); and see Reena Raggi, "An Independent Right to Freedom of Association," 12 Harv. Civ. Rights - Civ. Lib. L. Rev. 1 (1977); Charles E. Rice, "The Constitutional Right of Association," 16 Hastings L.J. 491 (1965); and Thomas I. Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1964).

21. 408 U.S. 169 (1972).

22. Gay Lib. v. Univ. of Missouri, 558 F. 2d 848 (8th Cir. 1977), cert. denied sub nom. Ratchford v. Gay Lib, 435 U.S. 981, 98 S. Ct. 1276 (1978). Neither Healy nor the Gay Lib case would be binding on a church related college unless plaintiffs suing such a college could pursuade a court that the college was somehow involved in "state action." On this elusive concept see Laurence H. Tribe, American Constitutional Law, (Mineola, N.J.: Foundation Press, 1978), pp. 1147-74; and John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, Constitutional Law (St. Paul: West, 1978), pp. 451-75.

23. See, e.g., United Transportation Union v. Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964). On the other hand, see the stormy history of the labor conspiracy, from the Philadelphia Cordwainers Case of 1806, Commonwealth v. Pullis, in Commons and Gilmore, eds., A Documentary History of American Industrial Society (New York, 1910), vol. 3, pp. 15-87, to In re Debs, 158 U.S. 564 (1896); on the use of the labor injunction, see Felix Frankfurter and Nathan Greene, The Labor Injunction (New York: MacMillan, 1930), and see the Norris-LaGuardia Act of 1932, Pub. L. 72-65, 47 Stat. 70, 29 U.S.C. 101.

24. See, e.g., Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); Cousins v. Wigoda, 419 U.S. 477 (1975); O'Brien v. Brown, 409 U.S. 1 (1972); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); DeGregory v. Atty. Gen. 383 U.S. 825 (1966); Noto v. United States, 367 U.S. 290 (1961); but see Communist Party v. SACB, 367 U.S. 1 (1961); Braden v. United States, 365 U.S. 431 (1961); and Wilkinson v. United States, 365 U.S. 399 (1961).

25. See, e.g., NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legislative Investigative Committee, 372 U.S. 539 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

26. See, e.g., Serbian Eastern Orthodox Diocese v. Milovojevich, 426 U.S. 696 (1976), and Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

27. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

28. In Shelton v. Tucker, 364 U.S. 479 (1960) the Court upheld the right of a state to inquire generally as to the fitness of its teachers, but invalidated a requirement that teachers disclose all their associational affiliations as needlessly overbroad. See also Slochower v. Bd. of Ed., 350 U.S. 551 (1956).

29. See Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago: Univ. of Chicago Press, 1965), pp. 1-12, 17-19.

30. Nancy H. Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978).

31. 330 U.S. 1, 1-18 (1947); see also the majority opinions of Justice Black in McCollum v. Bd. of Ed., 333 U.S. 203 (1948); Torcaso v. Watkins, 367 U.S. 488 (1961); and Engel v. Vitale, 370 U.S. 421 (1962).

32. See, e.g., Committee for Public Education v. Nyquist, 413 U.S. 756, 770 (1973); Flast v. Cohen, 392 U.S. 83, 103-04 (1968); Abington School District v. Schempp, 347 U.S. 203, 214 (1963); and McGowan v. Maryland, 366 U. S. 420, 430, 437-43 (1961).

33. Donald A. Giannella, "Religious Liberty, Non-Establishment and Doctrinal Development: Part II, The Non-Establishment Principle," 81 Harv. L. Rev. 513, 514-15 (1968); see also Giannella, "Religious Liberty, Non-Establishment and Doctrinal Development: Part I, The Religious Liberty Guarantee," 80 Harv. L. Rev. 1381 (1967).

34. Laurence H. Tribe, American Constitutional Law (Mineola, N.Y.: Foundation Press, 1978), p. 822.

35. 451 F. Supp. 564 (S.D. Miss. 1978).

36. Bob Jones University v. United States, F. Supp. (D.S.C., Civ. Action No. 76-775, decided Dec. 26, 1978).

37. Coit v. Green, 404 U.S. 997 (1971), affirming Green v. Connally, 330 F. Supp 1150 (D.D.C. 1971); see also Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), and McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

38. 396 F. Supp 597 (D.S.C.), aff'd., 529 F. 2d 514 (4th Cir. 1975).

39. See, e.g., Martin Luther King, Jr., Strength to Love (New York: Harper and Row, 1963); James Cone, Black Theology and Black Power (New York: Seabury, 1969); Joseph Hough, Black Power and White Protestants (New York: Oxford Univ. Press, 1968); Kyle Haselden, The Racial Problem in Christian Perspective (New York: Harper and Row, 1959); Waldo Beach, "A Theological Analysis of Race Relations," in Paul Ramsey, ed., Faith and Ethics (New York: Harper and Row, 1957); and Liston Pope, Racism and Christianity.

40. Charles M. Whelan, S.J., "Government Regulation and Tax Exemption," Origins (NC Documentary Service), Vol. 8 (Nov. 30, 1978), p. 384.

    In a recent article Fr. Whelan also wrote: "From the churches' point of view, religious exemptions fall into three somewhat different categories: the necessary, the desirable and the undesirable.

    Christian faith certainly demands some such distinctions among religious exemptions. Christ has given his church the mission to preach and baptize. No temporal leader has the right to frustrate the accomplishment of that mission. But the church's right to freedom is not a right to wholesale dispensation from the obligation of reasonable civil laws. Government is the God-given collaborator of the church for the common good of all men. Christ came to save us from sin, death and the devil, not from civil laws." Charles M. Whelan, S.J., "Government and the Church," America 139 (Dec. 16, 1978), p. 453.

41. Abington School District v. Schempp, 374 U.S. 203, 305 (1963), (Goldberg, J., joined by Harlan, J., concurring).

FOOTNOTES TO CHAPTER TWELVE

1. Council of the State Governments - Suggested State Legislation Volume XXVI (1967).

2. During a telephone conference with the authors, the legislative director of the National Commission on Uniform State Law indicated great interest in any amendments we might propose and said they would be promptly submitted to the National Commission for consideration. His records disclosed only two states which had passed the Model Act - Hawaii and Oklahoma. In fact, as we will see, several other of the sixteen states examined had passed portions of the Act.

3. Model Act Section 302(a)(1).

4. Minn. Laws Ann. Sec. 363.02; Ky. Rev. Stat. 344.090(A); Ann. Code of Md. Art. 49B, Sec 19(g)(1); Pa. Stat. Ann. Sec. 5(a); Hawaii Stat. Sec. 378-9(2); 25 Okla. Stat. Ann. Title 25 Sec. 1308; Ill. Ann. Stat. Sec. 853(e)(2); Ann. Laws of Mass. C 151 B, Sec. 4-1.

5. Ind. Code 22-9-1-3(h); Minn. Laws Ann. 363.01 Subd. 21; Rev. Stat. Sec. 344.090(3); Ann. Code of Md. Art. 49B, Sec. 19(g)(2); 25 Okla. Stat. Ann. Title 25, Sec. 1306(2).

6. Ohio Rev. Code 4112.02(K); Pa. Stat. Ann. Sec. 5(i)(2); Consol. Laws of N.Y. Ann. Art. 15, Sec. 296(11); Hawaii Rev. Stat. Sec. 378-9(5); Ill. Ann. Stat. 48, Sec. 852(d); Ann. Laws of Mass. C 151 B, Sec. 1.

7. Consol. Laws of N.Y., Ann. Art. 15, Sec. 296(11).

8. Ohio Rev. Code Sec. 4112.02(K): Pa. Stat. Ann. Sec. 5(i)(2); Consol. Laws of N.Y. Ann. Art. 15, Sec. 296(11); Hawaii Rev. Stat. Sec. 378-9(5).

9. Ann. Code of Md. Art. 49 B, Sec. 20.

10. 44 Ann. Cal. Code Sec. 1413(d).

11. N. Car. Stat. Sec. 143-422.2.

12. Ohio Rev. Code 4112.02(K), (H).

13. Minn. Laws Sec. Ann. 363.01. subd. 21; Sec. 363.02, subd. .3.

14. Ohio Rev. Code 4112.02(K).

15. See, for example, Minn. Laws Ann. Sec. 136A.18 and 136A.19, Subd. 4, which defines "eligible institution" and carefully spells out restrictions against funding of seminaries or institutions which attempt to promote any set of religious beliefs as distinguished from a scholarly study of religion.

16. (Charlottesville: The Michie Company, 1977).

17. Weiss v. Bruno, 509 P. 2d 973, 988 (Wash. 1973).

18. Ohio Rev. Code 4112.02(K); Minn. Laws Ann. Sec. 363.02; Pa. Stat. Ann. Sec. 5004(aa)(1); Consol. Laws of N.Y. Ann. Art. 15, Sec. 296.11; Ann. Laws of Mass. C 151 B (15).

19. Consol. Laws of N.Y. Ann. Art. 15, Sec. 313; Ann. Laws of Mass. C151 C; Ind. Code 20-8.1-2-1 et. seq.

20. N.J. Stat. Ann. 10:5-5(1).

21. Ind. Code 20-8.1-2-1(a).

22. Ind. Code 20-8.1-2-1(f).

23. Weiss v. Bruno, 509 P. 2d 973, 988 (Wash. 1973).